

No. 16-60478

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CAMPAIGN FOR SOUTHERN EQUALITY and SUSAN HROSTOWSKI,
Plaintiffs-Appellees,

v.

PHIL BRYANT, in his official capacity as Governor of the State of Mississippi; and JOHN
DAVIS, in his official capacity as Executive Director of the Mississippi Department of Human
Services,

Defendants-Appellants,

On Appeal from the United States District Court for the
Southern District of Mississippi (Northern Division)
No. 3:16-cv-00442-CWR-LRA (Hon. Carlton Reeves)
**Appellees' Opposition to Appellants' Motion to Stay
Preliminary Injunction Pending Appeal And Motion for
Expedited Consideration**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Campaign for Southern Equality, Plaintiff-Appellee. Campaign for Southern Equality is a North Carolina non-profit corporation with no parent corporation. No publicly held company owns ten percent or more of the Campaign for Southern Equality's stock.
2. Susan Hrostowski, Plaintiff-Appellee.
3. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Counsel for all Plaintiffs-Appellees (Roberta A. Kaplan and Joshua D. Kaye representing).
4. Dale Carpenter, Counsel for all Plaintiffs-Appellees.

5. Fishman Haygood, LLP, Counsel for all Plaintiffs-Appellees (Alysson Mills representing).

6. Phil Bryant, in his official capacity as the Governor of the State of Mississippi, Defendant-Appellant.

7. John Davis, in his official capacity as Executive Director of the Mississippi Department of Human Services, Defendant-Appellant.

8. John Otis Law Group, LLC, Counsel for Defendant-Appellants Phil Bryant and John Davis (Jonathan F. Mitchell and D. John Sauer representing).

9. Alliance Defending Freedom, Counsel for Defendant-Appellants Phil Bryant and John Davis (James A. Campbell representing).

10. Drew L. Snyder, Counsel for Defendant-Appellant Phil Bryant.

Respectfully submitted,

/s/ Roberta A. Kaplan
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Attorney of Record for Plaintiffs- Appellees

Defendant-Appellants Governor Phil Bryant and John Davis (“Appellants”) ask this Court to disrupt the *status quo* and order that House Bill (“HB”) 1523 go into effect while this Court hears the merits of this appeal of the district court’s order below.

STATEMENT OF THE CASE

The First Amendment of the United States Constitution and Mississippi’s Religious Freedom Restoration Act passed in 2014, Miss. Code Ann. § 11-61-1 (“RFRA”), already fully protect all Mississippians’ rights to believe what they choose and to practice their religions accordingly. Not content with treating all religious believers the same, the State of Mississippi enacted HB 1523, a law that bestows a broad array of special protections only upon people who adhere to one of the following three “religious beliefs”: (1) “Marriage is or should be recognized as the union of one man and one woman,” (2) “Sexual relations are properly reserved to such a marriage,” and (3) “Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth” (collectively, the “§ 2 Religious Beliefs”). HB 1523 § 2.

Among other things, HB 1523 purports to permit Mississippi officials and employees to deny marriage licenses to gay and lesbian couples and to advocate in favor of the § 2 Religious Beliefs while performing their official duties. *Id.* §§ 3(7), 3(8)(a). It bars government and even private plaintiffs from taking any

action against individuals and businesses who invoke a § 2 Religious Belief to deny “psychological” and “counseling” services to lesbian, gay, bisexual, and transgender (“LGBT”) people, as well as a litany of goods and services, including but not limited to “jewelry sales,” “floral arrangements,” or “car-service rentals.” *See id.* §§ 3(4), 3(5), 9(2), 9(3).

While the public accommodations that can be denied to LGBT people under HB 1523 are supposedly limited to those that relate to the “solemnization, formation, celebration, or recognition of any marriage,” §3(5), the statute is worded so broadly that it could apply not just to wedding ceremonies, but also to almost any business that serves gay or lesbian couples. A restaurant, for instance—a paradigmatic place of public accommodation—could refuse to seat a married lesbian couple at a table for two if its owner perceived the couple’s dinner date to be a “celebration” or “recognition” of their marriage.

HB 1523’s scope is further magnified by the fact that it gives holders of the § 2 Religious Beliefs—and no one else—absolute and unqualified rights without regard for (1) whether their free exercise of religion would have been burdened, and (2) the harms these absolute accommodations will impose on others. As Appellees’ expert testified at the hearing in the district court, HB 1523 is the only statute of its kind that both officially enshrines three specific religious beliefs into state law and gives religious believers an automatic exemption from otherwise

generally applicable laws or practices. Hr’g Tr. Vol. 1 64:22–65:7, 80:24–87:7 (June 23, 2016) (attached as App. A).

After reviewing the parties’ briefs and conducting a two-day hearing, the district court enjoined the enforcement of HB 1523, finding that it violates the Establishment Clause by creating religious preferences that impermissibly burden third parties and discriminate among religious sects. *Barber v. Bryant*, No. 3:16-cv-417-CWR-LRA, slip op. at 2 (S.D. Miss. June 30, 2016) (hereinafter, “slip op.”).

Unable to defend HB 1523 as written, Appellants now mischaracterize it as “carefully crafted and exceedingly limited in scope.” Stay Br. at 4. But HB 1523 is not a modest statute that merely reinforces the existing First Amendment right of all Americans not to be coerced into participating in religious practices inconsistent with their faith. Not only does HB 1523 go so far as to single out three specific religious beliefs for official State endorsement, but it permits (even encourages) discrimination in a wide variety of circumstances ranging from public accommodations to mental health care.

If HB 1523 were to go into effect for any length of time, the practical and dignitary consequences for LGBT people in Mississippi would be devastating. To give an example, at the hearing in the district court, Joce Pritchett, a lesbian and lifelong Mississippian, shared harrowing experiences—for example, that gay men

in Northern Mississippi have, since HB 1523 was enacted, become afraid to go out to dinner together. Hr’g Tr. Vol. 1 204:18–205:4 (June 23, 2016). She further testified that, after HB 1523 was enacted, the six-year old daughter of her friends was shamed by her public school teacher in the classroom simply for having married lesbian parents. *Id.* at 205:11–207:18.

Indeed, HB 1523 is completely unlike the other statutes that Appellants focus on in their moving papers relating to the draft or abortion, *see* Stay Br. at 1–3, 5, 9–15, because unlike those statutes, it was enacted without any neutral or secular purpose. Targeted exemptions for pacifists from the draft or for medical professionals unwilling to perform abortions do not facially discriminate on the basis of specific religions or religious beliefs and are narrowly tailored to serve important government interests. HB 1523, on the other hand, singles out and endorses the three § 2 Religious Beliefs for the sole purpose of promoting the exercise of those specific religious beliefs above all others, at the expense of the dignity of LGBT Mississippians.

STANDARD OF REVIEW

“The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of” judgments. *Nken v. Holder*, 556 U.S. 418, 427 (2009). Because a “stay is an intrusion into the ordinary processes of administration and judicial review,” a party

“is not entitled to a stay as a matter of right.” *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quoting *Nken*, 556 U.S. at 427). Rather, the party “requesting a stay,” must “bear[] the burden of showing that the circumstances justify an exercise of [this Court’s] discretion.” *Nken*, 556 U.S. at 433. In exercising that discretion, this Court considers the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Texas v. United States*, 787 F.3d 733, 746–47 (5th Cir. 2015) (internal quotation marks omitted).¹

I. Appellants Have Failed to Make a Strong Showing on the Merits

Appellants have not made any showing, let alone a “strong showing,” that each of the grounds on which the district court found HB 1523 violated the United States Constitution are likely to be overturned on appeal. With respect to the

¹ Appellants’ motion can and should be denied solely on the basis that Defendants have not complied with Federal Rule of Appellate Procedure 8. *See Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. Unit A June 1981). On July 7, Governor Bryant filed a motion to stay with the district court. Opposition to that motion was not due until July 21. Nevertheless, just four days after filing that motion, Governor Bryant filed this motion. In so doing, Governor Bryant failed to comply with Fed. R. App. P. 8, which requires the movant to show “that moving first in the district court would be impracticable,” or that “the district court denied the motion.” Fed. R. App. P. 8(a)(2)(A). Appellants obviously cannot show that moving first in the district court would be “impracticable” since they did move for a stay in the district court. Mot. to Stay Prelim. Inj. Pending Appeal (ECF No. 42). Nor can Appellants show that the district court “denied the motion or failed to afford the relief requested” since Judge Reeves has not yet had a chance to rule on their motion to stay.

Establishment Clause,² the district court found that HB 1523 “violates the First Amendment because its broad religious exemption comes at the expense of other citizens.” Slip op. at 55. It further held that HB 1523 “clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents” and thus cannot withstand strict scrutiny. Slip op. at 52–54 (quoting *Larson v. Valente*, 456 U.S. 228, 246–47 (1982)). The district court also held that HB 1523 “was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.” Slip op. at 53 n.43 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). *See also Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (requiring all laws to “have a secular legislative purpose”).

Appellants’ only response to the district court’s finding that the religious exemptions in HB 1523 come at the expense of other citizens is to mischaracterize HB 1523, disregard settled jurisprudence, and misstate the record. Although Appellants dismiss the need for this Court to consider those who do not subscribe to the § 2 Religious Beliefs, binding precedent on this Court places such consideration at the very heart of any Establishment Clause analysis.

1. HB 1523 Violates *Thornton v. Caldor*

In *Estate of Thornton v. Caldor*, the United States Supreme Court held that a statute which “arms [believers] with an absolute and unqualified right” that “would

² Because the *CSE* Plaintiffs only brought claims under the Establishment Clause, they only discuss the portion of the district court’s order relating to those claims.

require the imposition of significant burdens on” third parties impermissibly advances religion in violation of the Establishment Clause. 472 U.S. 703, 708–10 (1985). *Thornton* has never been called into question by the Supreme Court and remains good law. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“Our decisions indicate that [a religious] accommodation must be measured so that it does not override other significant interests.” (citing *Thornton*, 472 U.S. at 709)). Applying *Thornton* here, the district court held that HB 1523 violates the Establishment Clause because it “gives persons with § 2 beliefs an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service.” Slip op. at 56.³

In support of their argument, Appellants point only to the *Gillette* case, which was decided over a decade before *Thornton* and which did not address the question of burden. Stay Br. at 15 n.6 (citing *Gillette v. United States*, 410 U.S. 437 (1971)). But in fact, the differences between the incidental burden imposed on others by the conscientious objectors in *Gillette* is markedly different than the burden imposed by HB 1523. While the burden on other prospective draftees for each person removed from the draft pool is an infinitesimally small increase in the

³ Appellants all but ignore this portion of the district court’s opinion. The entirety of their response is buried in a footnote near the end of their brief, in which they argue that the “district court also erred by holding that the Establishment Clause forbids religious accommodations that have adverse impacts on third parties.” Stay Br. at 15 n.6. But this statement is wholly inconsistent with *Thornton* and *Cutter*, which forbid religious accommodations that impose burdens on third parties

odds of being selected, the burden on Mississippians who will directly be denied services by government employees or private businesses under HB 1523 is substantial and immediate.

Although Appellants argue that HB 1523 “does not impose substantial burdens on third parties,” Stay Br. at 15 n.6, this ignores not only two days of testimony in the district court regarding the effects of HB 1523 on LGBT people and others,⁴ but the text of the statute itself. Far from merely applying to people who wish to “decline to participate in same-sex marriages,” Stay Br. at 4, 18, 19, HB 1523 removes government protections from LGBT Mississippians and encourages their neighbors to discriminate against them in a wide variety of everyday contexts. *See* Compl. (ECF No. 1) ¶¶ 79–108; Mem. of Law in Support of Pls.’ Mot. for Prelim. Inj. (ECF No. 3) at 16–22. As noted above, notwithstanding Appellants’ claim that HB 1523 “does not authorize *any* business to discriminate against [LGBT] people in . . . access to places of public accommodation,” Stay Br. at 4, § 3(5) of HB 1523 explicitly permits a person or business claiming a § 2 Religious Belief to refuse to provide “services, accommodations, facilities, goods, or privileges” so long as they are “related to

⁴ *See, e.g.*, Hr’g Tr. Vol. 1 179:15–23, 183:10–184:5 (June 23, 2016) (testimony of Kathy Garner, director of AIDS Services Coalition of Hattiesburg, Mississippi, that if HB 1523 goes into effect and mental health professionals are permitted to deny counseling to people at risk of becoming infected with HIV, “people will die”).

the solemnization, formation, celebration, or recognition of any marriage.”⁵ These exemptions strictly apply *only* to those who hold one of the § 2 Religious Beliefs, and would not protect, for instance, a store owner who does not want to sell an engagement ring to an interfaith couple or a couple where one member was previously divorced.

And contrary to the Appellants’ assertion, HB 1523 contains no provision to adequately ensure that LGBT people “will still receive . . . health care.” Section 3(4) of HB 1523 permits healthcare providers (including therapists and public school guidance counselors) who hold one or more of the § 2 Religious Beliefs to “decline[] to participate in the provision of psychological, counseling, or fertility services” to LGBT patients, the children of gay parents, or people who have had sex outside of marriage.⁶ Indeed, as we argued to the district court, under this provision, a suicidal high school student receiving counseling or psychological services could have those services come to an abrupt end (with potentially tragic consequences) if he were to disclose that he thinks he might be gay. Hr’g Tr. Vol.

⁵ On June 14, 2016, the City of Jackson, Mississippi passed an ordinance which added city-wide nondiscrimination protections based on sexual orientation and gender identity in housing, public accommodations, and employment. *See* Jackson, Mississippi Code of Ordinances § 86-227.

⁶ This is so despite the fact that such providers have an independent ethical obligation *not* to discriminate against LGBT patients. *See, e.g.*, 2014 ACA Code of Ethics, Rule C.5, *available at* <https://www.counseling.org/resources/aca-code-of-ethics.pdf>.

2 275:8–20 (June 24, 2016) (attached as App. B).⁷ *See also* Hr’g Tr. Vol. 1 194:4–19 (June 23, 2016) (Joce Pritchett testifying that if, when she was first coming out as a lesbian, her psychologist had stopped her treatment because of a religious belief that marriage is only between a man and a woman, she does not “know that [she] would be here today.”).

2. HB 1523 Establishes Denominational Preferences

As the district court concluded, slip op. at 2, HB 1523 also violates the fundamental command that “Government . . . must be neutral in matters of religious theory, doctrine, and practice,” and “may not aid, foster, or promote one religion or religious theory against another[.]” *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968). It violates “the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can ‘pass laws which aid one religion’ or that ‘prefer one religion over another.’” *Larson*, 456 U.S. at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

As noted above, Mississippians’ free exercise of religion is already protected by the First Amendment and the Mississippi RFRA. These protections were already in effect prior to HB 1523’s enactment, and they do not single out any particular religious belief or creed as more worthy of protection than any other.

⁷ Section 3(4) contains a carve-out for “emergency medical treatment necessary to cure an illness or injury as required by law” but is silent as to other care, including equally life-saving mental health care.

HB 1523, by contrast, establishes three and only three specific, State-sanctioned religious beliefs, which entitle their adherents to special protection.

More specifically, under RFRA, any Mississippian whose exercise of religion is substantially burdened by the state government can seek an exemption, which will be granted unless the burden is the “least restrictive means” of furthering “a compelling governmental interest.” Miss. Code. Ann. § 11-61-1(5)(b). But under HB 1523, Mississippians who hold one or more of the § 2 beliefs—but no one else—are entitled to an *automatic* and *absolute* exemption from nearly any government action against them. Thus, a holder of the § 2 Religious Beliefs need not show any burden on his free exercise of religion, let alone a substantial burden. And HB 1523’s protections purport to automatically override *all* government interests, no matter how compelling.

It cannot be seriously disputed that the three § 2 Religious Beliefs are tenets of some religious denominations, but directly contradict the doctrines of others. As the district court concluded, “HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.” *See slip op.* at 48–52. Unlike laws that “neutrally accommodate[] religious beliefs and practices, without endorsement,” by making “benefits generally available within the State to religious observers,” HB 1523 “single[s] out a particular class of such persons for favorable

treatment and thereby ha[s] the effect of implicitly endorsing a particular religious belief.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 145 n.11 (1987).

Appellants’ argument that some adherents may disagree with their own religion’s teachings on gender or sexuality does not save HB 1523. *See* Stay Br. at 14–15. “Intrafaith differences . . . are not uncommon among followers of a particular creed.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981). Indeed, as evidence presented to the district court established, in most cases (with the sole exception of Catholics who generally disagree with the Vatican on this issue), an individual’s beliefs on these subjects mirror those of his or her denomination. *See* slip op. at 50 n.41 (listing doctrinal positions); Hr’g Tr. Vol. 2 at 224:9–12, 226:19–227:23 (June 24, 2016) (testimony of Robert Jones, expert in the field of religion and public opinion).⁸

3. HB 1523 is Materially Different From Laws Relating to the Draft, Abortion, and Oath Taking

Unable to refute the district court’s holding that “[o]n its face, HB 1523 constitutes an official preference for certain religious tenets,” slip op. at 48,

⁸ HB 1523 is also not rendered constitutional by the fact that it does not explicitly name the denominations it endorses. *See* slip op. at 48–49 (noting that the unconstitutional statute in *Larson* drew distinctions without identifying any denomination by name). “The question of governmental neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses.” *Gillette v. United States*, 401 U.S. 437, 452 (1971) (internal quotation marks omitted).

Appellants devote much of their brief to a discussion not of HB 1523, but of other laws concerning abortion, military service, and oath-taking, *see* Stay Br. at 1–3, 5, 9–15. But those laws, which are not at issue in this case, are distinguishable from HB 1523 in ways that actually highlight HB 1523’s constitutional infirmities.

First, the other accommodations cited by Appellants provide narrowly-crafted exemptions from specific actions and are directed at protecting an individual from having to act inconsistently with his or her faith, not at protecting an individual from somehow being complicit in the “sinful” choices of others. *See* Hr’g Tr. Vol. 1 52:4–14 (June 23, 2016). Performing or assisting with an abortion procedure, serving in the armed forces during a time of war, or placing one’s hand upon a Bible to swear an oath are very different from everyday acts like renting a car, serving dinner, or selling a bouquet of flowers. *See, e.g.*, HB 1523 § 3(5). In other words, there is a big difference between a pacifist refusing to go to war and a pacifist refusing to sell a sandwich to a soldier in uniform.

Second, Appellants point to accommodations that, unlike HB 1523, “serve[] a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions.” *Gillette*, 401 U.S. at 452. Exemptions from military service, for example, reflect “considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man.” *Id.* at 452–53. It has been argued that forcing a physician

who objects to abortion to perform an abortion procedure could undermine the effectiveness of patient care. See Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 Ind. L.J. 703, 733 (2014). Refusing to allow individuals who object to swearing oaths to testify in courts of law would result in the exclusion of reliable evidence and miscarriages of justice. There is no comparable neutral, secular purpose for HB 1523. To the contrary, as Appellants concede, the only situations in which HB 1523 will provide any additional protections beyond those already afforded under Mississippi RFRA are those in which there is no substantial burden on the free exercise of religion and/or an accommodation would actually be contrary to a compelling government interest. Stay Br. at 4.

If, like HB 1523, a law contains a religious accommodation that draws a distinction between religious beliefs, then there must be “a neutral, secular basis” not only for the exemption generally, but also “for the lines [the] government has drawn.” *Gillette*, 401 U.S. at 452. The Supreme Court, for example, permitted the Selective Service laws at issue in *Gillette* to exempt from service only those who morally objected to all wars (as opposed to some wars) because “valid neutral reasons exist for limiting the exemption” in that way, and the limitation “therefore cannot be said to reflect a religious preference.” *Id.* at 454, see also *id.* at 459–60. A law like HB 1523 that distinguishes among religious tenets also “must be

invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest.” *Larson*, 456 U.S. at 246 (internal citations omitted); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987); Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 Neb. L. Rev. 651, 660 (1991) (“[T]he best explanation for the result in *Gillette* is that the Court concluded that the Selective Service Act survived some form of heightened scrutiny.”).

Here, however, Appellants have not articulated any valid secular purpose at all, much less a compelling governmental interest for HB 1523’s extension of rights and benefits only to individuals who hold the § 2 Religious Beliefs. Indeed, given the “laundry list” nature of the statute, it is hard to see how HB 1523 could be narrowly tailored to serve *any* legitimate government interest, assuming that one existed. Although Appellants asserted at the district court that “*Obergefell* dramatically tilted the playing field against conscientious objectors to same-sex marriage,” Brief in Opposition for Defendant, at 30 n. 30, *Barber v. Bryant*, No. 3:16-cv-417 (S.D. Miss. June. 17, 2016) (ECF No. 30), *Obergefell* said nothing about two of the three beliefs that HB 1523 promotes. Moreover, rather than depriving anyone of religious liberty, Justice Kennedy’s opinion “emphasized that religions, and those who adhere to religious doctrines, may continue to advocate

with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. . . . The Constitution, however, does not permit the State to bar same-sex couples from marriage *on the same terms* as accorded to couples of the opposite sex.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (emphasis added).⁹

Because appellants are thus unable to identify “any actual, concrete problem of free exercise violations” that HB 1523 would address, they cannot satisfy strict scrutiny. Slip op. at 53–54. All Mississippians’ free exercise of religion was already protected by the Mississippi RFRA and the First Amendment. Appellants’ effort to justify HB 1523’s religious gerrymandering bears striking resemblance to the “basic concept of fairness” that state officials claimed motivated the statute at issue in *Edwards v. Aguillard*, which mandated the teaching of “creation science” in Louisiana public schools that chose to teach evolution. 482 U.S. 578, 586 (1987), *aff’g Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985). But that did not stop both this Court and the Supreme Court from concluding that “the goal of

⁹ Section 3(8)(a) of HB 1523 permits Mississippi Circuit Clerks and their deputies to deny marriage licenses to gay and lesbian couples (while continuing to issue marriage licenses to all other couples) on the basis of a § 2 Religious Belief. Appellants do not and cannot explain how being turned away when seeking to exercise the fundamental right to marry is not a substantial burden that HB 1523 imposes on third parties in violation of the Establishment Clause. Indeed, as the district court pointed out, it is not at all clear what would happen in a small Mississippi county in which the clerk and all his deputies decided to recuse themselves pursuant to this section. *Campaign for S. Equal. v. Bryant*, No. 3:14-cv-818-CWR-LRA, Mot. To Reopen Hr’g Tr. 23:17–22 (June 20, 2016).

basic ‘fairness’ is hardly furthered by [that] Act’s discriminatory preference . . .”
Id. at 588.

II. Appellants Will Not Suffer Irreparable Harm

In support of their argument that the State will suffer irreparable injury, Appellants cite two cases neither of which is relevant. In *Maryland v. King*, for example, Chief Justice Roberts noted that the enjoined DNA testing policy “provid[ed] a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population.” 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Thus, it was not the mere fact of the injunction that caused the irreparable harm in *King*, but rather the possibility “[t]hat Maryland may not employ a duly enacted statute to help prevent these injuries.” *Id.* (emphasis added). Similarly, in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, this Court placed great weight on the “substantial interests of the State in regulating the medical profession.” 734 F.3d 406, 411 (2013). By this Court’s logic (implicitly disfavored by the Supreme Court this last term¹⁰), the challenged statute served the substantial government interest of protecting women’s health.

Here, by contrast, Appellants point to no state interest served by HB 1523 that is in any way comparable to the preservation of physical health and safety at

¹⁰ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *rev’g Whole Woman’s Health v. Cole*, 790 F.3d 598 (5th Cir. 2015).

issue in *King* and *Planned Parenthood*.

III. Appellees Would Be Substantially Injured By a Stay

Far from being “trivial,” Stay Br. at 18, allowing HB 1523 to go into effect, even temporarily, would cause Plaintiffs substantial and irreparable First Amendment injury.¹¹ Appellants’ assertion that there is “an abundance of LGBT-friendly churches and businesses available” in Mississippi, Stay Br. at 20, even if true in all parts of the State, says nothing about the dignitary and other injury Plaintiffs suffer from HB 1523’s enforcement. Slip op. at 58; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (applying *Elrod* to Establishment Clause injury); see also *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) (denying stay pending appeal of injunction ordering removal of Ten Commandments from school property because “the granting of a stay pending appeal will subject the high school students and others who frequent the schools to continuing violations of the Establishment Clause”).

Although Appellants take the position that staying enforcement of HB 1523

¹¹ While Appellants assert that Plaintiffs have not claimed they plan to obtain a marriage license during the appeal, the Campaign for Southern Equality has been held to be an institutional plaintiff, suing on behalf of its members, including gay couples who plan to marry in the near future. See *Campaign for S. Equal v. Bryant*, 64 F. Supp. 3d 906, 917–18 (S.D. Miss. 2014), *aff’d*, 791 F.3d 625 (5th Cir. 2015).

will not harm Appellees because the Mississippi RFRA already overrules antidiscrimination ordinances such as the one recently enacted in Jackson, Mississippi, Stay Br. at 18–19, as discussed above, the Mississippi RFRA does not afford the kind of automatic protection that HB 1523 provides. Instead, the Mississippi RFRA permits government entities, such as the City of Jackson, to demonstrate that there is a compelling government interest in protecting citizens from discrimination. Miss. Code Ann. § 11-61-1(5)(b).¹²

IV. The State Has Failed to Make a Strong Showing That Violating Constitutional Rights Is in the Public Interest

Of course, injunctions preventing constitutional violations “are always in the public interest.” *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012). As Governor Bryant forcefully argued to this Court two years ago when appealing the district court’s preliminary injunction enforcing gay and lesbian Mississippians’ constitutional right to marry, “the public interest would best be served by holding the status quo until [the Fifth Circuit] ha[s] spoken.” *Opposed Emergency Mot. To Stay Effect of Prelim. Inj. Pending Appeal, Campaign for S. Equal. v. Bryant*, 14-60837, Doc. 00512850678, at 5 (Nov. 26, 2014). On this point, Appellees agree—the *status quo* should be maintained and

¹² Appellants implausibly assert that HB 1523 remains good law in state court proceedings. Stay Br. at 19. But even in the unlikely event that a state court judge were to completely disregard a federal court’s holding that HB 1523 violates the Constitution, a federal court could, in some circumstances, enjoin state court proceedings where doing so is necessary “to protect or effectuate its judgments.” *See* 28 U.S.C. § 2283.

HB 1523 should not go into effect.

V. The Appeal Should Not Be Expedited

As discussed above, this Court should deny the motion to stay, thereby maintaining the *status quo* pending ultimate resolution, and allow this appeal to proceed on a normal schedule that gives the parties, potential amici, and the Court adequate time to consider the issues presented. If, however, the Court instead grants the motion to stay, and thereby upsets the *status quo*, Appellees join Appellants in their request for expedited consideration.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that the Court deny Appellants' Motion to Stay the Preliminary Injunction Pending Appeal.

Dated: July 25, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that on July 25, 2016, this motion was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system and that this motion complies with the requirements of 5th Cir. R. 27.4, Fed. R. App. P. 27(d), Fed. R. App. P. 32(a), and 5th Cir. R. 32.

The undersigned further certifies that: (1) any required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; and (2) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 25, 2016, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF system for filing and thereby served on all counsel who have entered their appearance in this action.

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APPENDIX

Appendix Table of Contents

Transcript of June 23, 2016 Hearing.....A
Transcript of June 24, 2016 Hearing.....B

A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00417-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

AND

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00442-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION

VOLUME 1 OF 2

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
JUNE 23, 2016
JACKSON, MISSISSIPPI

REPORTED BY: CHERIE GALLASPY BOND
Registered Merit Reporter
Mississippi CSR #1012

501 E. Court Street, Ste. 2.500
Jackson, Mississippi 39201
(601) 608-4186

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APPEARANCES :

FOR THE PLAINTIFFS IN CASE 417 :

MR. ROBERT MCDUFF
MS. SIBYL C. BYRD
MR. CHARLES O. LEE
MR. JOSEPH REILLY MORSE

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MR. JACOB J. TABER
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FOR THE DEFENDANTS HOOD AND MOULDER :

MR. DOUGLAS T. MIRACLE
MR. PAUL E. BARNES

FOR THE DEFENDANTS BRYANT AND DAVIS :

MR. TOMMY D. GOODWIN

TABLE OF CONTENTS

VOLUME 1

OPENING STATEMENTS

Opening Statement by Mr. McDuff8

Opening Statement by Ms. Kaplan13

Opening Statement by Mr. Barnes18

WITNESSES FOR THE CSE PLAINTIFFS

DOUGLAS NEJAIME 42

Direct Examination By Mr. Kaye42

Cross-Examination By Mr. Goodwin65

Redirect Examination By Mr. Kaye77

Examination By The Court81

Exhibits P-2, P-3, P-4, P-5, P-6,85

P-7, P-8, P-9, P-10, P-11, P-12, P-13,

P-14, P-5, P-16, P-17, P-18, P-19,

P-20, P-21, P-22, P-23, P-24

Exhibits CSE-10, CSE-14 CSE-15, CSE-16.....86

CSE-26, CSE-27 CSE-28, and CSE-29

Exhibits D-1, D-2, D-3 and D-487

RABBI JEREMY SIMONS 88

Direct Examination By Mr. Taber88

Cross-Examination By Mr. Goodwin110

REVEREND SUSAN HROSTOWSKI 116

Direct Examination By Mr. Dieter116

Direct Examination By Mr. McDuff135

1	Cross-Examination By Mr. Miracle	137
2	Redirect Examination By Mr. Dieter	149
3	WITNESSES FOR THE BARBER PLAINTIFFS	
4	CAROL BURNETT	152
5	Direct Examination By Mr. McDuff	152
6	Cross-Examination By Mr. Goodwin	160
7	Redirect Examination By Mr. McDuff	164
8	BRANDIILYNE MANGUM-DEAR	165
9	Direct Examination By Mr. McDuff	165
10	Examination By The Court	175
11	WITNESSES FOR THE CSE PLAINTIFFS	
12	KATHY GARNER	176
13	Direct Examination By Mr. Kaye	176
14	Cross-Examination By Mr. Miracle	184
15	Redirect Examination By Mr. Kaye	187
16	JOCE PRITCHETT	189
17	Direct Examination By Ms. Kaplan	189

18
19
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1 (Court Called to Order)

2 THE CLERK: Before the court this morning are cases
3 styled and numbered *Rims Barber, et al. v. Governor Phil*
4 *Bryant, et al.*, civil action number 3:16CV417CWR-LRA and
5 *Campaign for Southern Equality, et al. v. Phil Bryant, et al.*,
6 civil action number 3:16CV442-CWR-LRA.

7 THE COURT: Good morning.

8 (All responded good morning)

9 THE COURT: The court would ask since we do have
10 people who are concerned observers all in the courtroom today,
11 please refrain from talking while in the courtroom, even in a
12 hushed tone because your voices are amplified and it might
13 interfere with the court reporter's duty and obligation to make
14 an accurate record. If you have to leave at any time, just be
15 quiet as you're leaving. I do not require you to sit here and
16 forego a bathroom break or anything like that.

17 These matters have been consolidated for the purposes
18 of this hearing. The court has spoken with the counsel, and we
19 have procedural guidelines as to how we will proceed in this
20 case. There are many lawyers involved. I just need to make
21 sure that all lawyers who are involved have entered an
22 appearance in this matter. Is that right on behalf of the
23 collective plaintiffs? Has everyone entered an appearance
24 whether pro hac vice or otherwise?

25 MR. McDUFF: Yes, Your Honor.

1 THE COURT: Okay. Is that the same for the Paul,
2 Weiss group?

3 MS. KAPLAN: Yes, Your Honor.

4 THE COURT: This matter is before the court on the
5 matter of preliminary injunction regarding what is commonly
6 known or colloquially known as HB 1523. So we're going to be
7 taking evidence today; but before that, we will have brief
8 opening statements. Who wishes to go first on behalf of the
9 plaintiffs?

10 MR. BARNES: I'll go first, Your Honor.

11 THE COURT: Okay. Mr. Barnes.

12 MR. BARNES: Yes, Your Honor, we had a global
13 objection that we wanted to present to the court --

14 THE COURT: Okay.

15 MR. BARNES: -- before we went forward.

16 THE COURT: Please do.

17 MR. BARNES: Your Honor, may it please the court, my
18 name is Paul Barnes, and I represent two of the defendants, the
19 Attorney General, Jim Hood, and Judy Moulder. With me is my
20 cocounsel, Mr. Miracle, who represents the same parties in the
21 CSE III case; Mr. Goodwin, who represents the governor and John
22 Davis, the head of MDHS in both cases.

23 Your Honor, the defendants just want to on the record
24 renew our objections to the consolidation on the hearing on the
25 motion for preliminary injunction filed by the plaintiffs in

1 CSE III, which is case 3:16CV442 and the motion for preliminary
2 injunction filed in the Barber case, which is number 417.

3 This denies defendant's adequate notice and reasonable
4 opportunity to be heard and a meaningful opportunity to be
5 heard. Consolidation of these matters for hearing on
6 approximately one week's notice significantly increases the
7 complexity, the number of witnesses, and the issues which have
8 to be addressed.

9 For example, plaintiffs in CSE III anticipate calling
10 at least two, apparently three expert witnesses as to whom we
11 have no disclosures other than the CVs of two of those
12 witnesses. So there's no way we can anticipate their testimony
13 or whether the court can and whether we can even determine
14 whether or not it should be admissible, et cetera. So it's
15 impossible to adequately prepare under those circumstances.

16 Further consolidation has caused scheduling problems
17 related to the testimony of at least one of the witnesses, I
18 believe Dr. Jones, who the court is going to hear tomorrow, as
19 told us. So we expressly renew and do not waive our objections
20 to the presentation of any evidence, argument, witnesses, or
21 exhibits related to the CSE III case and motion at this hearing
22 today, as this matter in action number 417 was set for hearing
23 at a prior time, and the State was provided the time permitted
24 by the rules to respond and prepare for the case in Barber
25 filed by Mr. McDuff.

1 THE COURT: Thank you. Any response from the other
2 side?

3 MS. KAPLAN: Your Honor, I think we think all of these
4 arguments were fully presented to Your Honor at the telephone
5 conference that was transcribed, and there's no need to repeat
6 them here only except to correct the record to the extent that
7 we only have two expert witnesses, and they have the resumés of
8 both of them.

9 THE COURT: Okay. Thank you. One correction. I
10 don't think the telephone conference was transcribed. I know I
11 didn't have it transcribed on my end.

12 MS. KAPLAN: Withdrawn, Your Honor.

13 THE COURT: Okay. But the motion -- the motion is
14 denied. The court believes that there has been sufficient time
15 for the parties on this matter of preliminary injunction, which
16 obviously is far different from a trial on the merits. So the
17 court is going to deny that objection. Are you ready to
18 proceed, Mr. McDuff?

19 MR. McDUFF: Yes, Your Honor.

20 OPENING STATEMENT BY

21 MR. McDUFF: Good morning. I'm Robert McDuff, along
22 with my law partner, Sibyl Byrd, and our cocounsel from the
23 Mississippi Center of Justice, Reilly Morse and Charles Lee.
24 We represent the plaintiffs in *Rims Barber, et al. v. Phil*
25 *Bryant*, one of the two cases that has been consolidated this

1 morning for the hearing.

2 Our challenge is that House Bill -- and our allegation
3 is that HB 1523 violates the establishment clause that requires
4 a separation between church and state of the First Amendment to
5 the United States Constitution and also violates the equal
6 protection clause requiring equal treatment among citizens of
7 the Fourteenth Amendment.

8 We are going to have plenty of time later on to
9 discuss the legal positions in the case. I want to say for now
10 that two of our plaintiffs will be testifying today; but as you
11 know, there are 13 plaintiffs in total. We have submitted
12 written sworn declarations on behalf of each of them to the
13 court.

14 In the interest of time, they are not all being called
15 as witnesses today, but they represent a broad collection of
16 Mississippians that reflects the thousands of people throughout
17 the state who have opposed this bill. The plaintiffs in the
18 Barber case are gay, lesbian, transgender and straight citizens
19 of the state of Mississippi. They include members of all of
20 the three groups that we contend are disfavored and condemned
21 by HB 1523, same-sex couples who marry or plan to marry,
22 unmarried people engaged in sexual relations, and transgender
23 people.

24 The plaintiffs are:

25 Reverend Rims Barber, the director of the Mississippi

1 Human Services coalition, a long-time community activist
2 throughout the state ever since he came to Mississippi in 1964
3 to participate in the civil rights movement and an ordained
4 Presbyterian minister.

5 Carol Burnett, who will testify today, the director of
6 the Mississippi Low Income Child Care Initiative and the Moore
7 Community House on the Mississippi Gulf Coast, a long-time
8 activist for social justice and an ordained Methodist minister.

9 Joan Bailey, a retired therapist whose practice was
10 largely devoted to lesbian women who began working on issues
11 involving discrimination against gay and lesbian people in the
12 mid 1980s when she was asked to join a committee at St. Andrews
13 Episcopal Cathedral and paradoxically describes herself as a
14 resident of northeast Jackson.

15 Katherine Elizabeth Day, a transgender woman from
16 Jackson, who is an artist and activist.

17 Anthony Laine Boyette, a transgender man from the
18 Mississippi Gulf Coast.

19 Reverend Don Fortenberry, an ordained Methodist
20 minister and long-time social justice activist and retired
21 chaplain of Millsaps College.

22 Dr. Susan Glisson, the founding director of the Winter
23 Institute for Reconciliation at the University of Mississippi,
24 an unmarried woman in a long-term relationship with an
25 unmarried man.

1 Derrick Johnson, the executive director of the
2 Mississippi State conference of the NAACP and a civil rights
3 activist in every sense of the word.

4 Dorothy C. Triplett, a well-known, highly regarded
5 community and political activist who has been involved in
6 social issues across the spectrum who lives here in Jackson.

7 Renick Taylor, a field engineer at CBIZ Network
8 Solutions on the Gulf Coast, a political activist, a military
9 veteran, the first openly gay person to represent his political
10 party at a national political convention. He is a gay man
11 engaged to be married to his male partner during the summer of
12 2017.

13 Brandiilyne Mangum-Dear, who will testify today, the
14 lay pastor at the Joshua Generation Metropolitan Community
15 Church in Hattiesburg. Her partner, Susan Mangum is also a
16 plaintiff. She is the minister of music at the Joshua
17 Generation Metropolitan Community Church and is a paralegal at
18 a law practice in Laurel.

19 And the Joshua Generation Metropolitan Community
20 Church itself, a church in Hattiesburg that is an inclusive
21 ministry that welcomes all people regardless of age, race,
22 sexual orientation, gender identity or social status.

23 We are joined today by the plaintiffs in the case that
24 was filed very soon after ours, *Campaign for Social Equality v.*
25 *Bryant*.

1 The plaintiffs there are the Campaign, which has been
2 a plaintiff in the cases challenging the ban on same-sex
3 marriage and the ban on same-sex adoption, also Dr. Susan
4 Hrostowski, who is a plaintiff in the challenge to the adoption
5 statute, and they are represented by the lawyers who took the
6 lead in those two cases, Roberta Kaplan and Joshua Kaye, as
7 well as their colleagues from the Paul Weiss law firm in New
8 York. Ms. Byrd and I were fortunate enough to assist them in
9 those cases, and we are pleased to be here today coordinating
10 the presentation of evidence.

11 Ms. Kaplan will speak in a moment about the witnesses
12 they are going to present. They will begin with a few
13 witnesses, and then Carol Burnett and Brandiilayne Dear-Mangum
14 will testify at some point during the middle of that
15 presentation. But we submit their testimony along with the
16 declarations of all of these other plaintiffs who I have just
17 mentioned.

18 We will be talking further about the legal issues and
19 the factual issues. I just want to conclude now by saying that
20 we are very honored to be here today with this collection of
21 plaintiffs from our case and the plaintiffs from the coalition
22 case -- the Campaign case who stand with thousands of
23 Mississippians across this state, gay, lesbian, transgender,
24 straight, who are pursuing a vision of a tolerant and inclusive
25 society that abides by the principles of the United States

1 Constitution. That is why we are here today, and we thank the
2 court for your consideration of our case.

3 MS. KAPLAN: Good morning, Your Honor.

4 THE COURT: Good morning.

5 OPENING STATEMENT BY

6 MS. KAPLAN: We are here today, as you heard my able
7 colleague and friend Mr. McDuff explain, to present testimony
8 in this case. The Campaign for Southern Equality case focuses
9 solely on the establishment clause and challenges HB 1523 under
10 that clause. As the court is aware, the First Amendment of the
11 United States constitution provides that the government shall
12 make no law respecting an establishment of religion.

13 Justice Marshall in the *Gillette v. United States* case
14 from 1971 explained what that means is that as a general
15 matter, it is surely true that, "The establishment clause
16 prohibits government from abandoning secular purposes in order
17 to put an imprimatur on one religion or one religion as such or
18 to favor the adherence of any sect or religious organization."

19 In this case, we have three main theories for why
20 HB 1523 violates the establishment clause. First, we believe
21 that HB 1523 was enacted with the impermissible and sole
22 purpose of advancing certain religious views and with no
23 secular purpose whatsoever. And I will note on that, since I
24 assume it will come up, that in establishment clause cases,
25 unlike other cases -- constitutional provisions that sometimes

1 are brought before the court, legislative history and context
2 is per se admissible.

3 The Supreme Court has said over and over and over
4 again that when you're deciding whether a statute challenged
5 under the establishment clause was enacted for a secular or a
6 religious purpose, the history and context of the statute and
7 how it was passed is relevant and admissible. You don't have
8 any debates with Justice Scalia about legislative history in
9 that context.

10 Our second argument is that HB 1523 improperly and
11 unconstitutionally discriminates between religious beliefs and
12 religious sects.

13 And our third argument is that HB 1523 impermissibly
14 favors religion over nonreligion by imposing significant
15 burdens on nonbelievers, most specifically on LGBT people.

16 Any one of those grounds standing alone would be
17 enough to invalidate the statute, but here we believe all three
18 are more than satisfied.

19 What I think would be most helpful right now is for me
20 to describe our witnesses, provide kind of a road map of our
21 witnesses and explain how their testimony supports these three
22 establishment clause theories.

23 The first one you will hear from this morning is
24 Professor NeJaime from UCLA law school. Professor NeJaime is
25 an expert on the history of religious accommodation laws and

1 the efforts by right-wing religious groups to enact those laws
2 in the wake of the *Obergefell* decision. He will set the table
3 today by explaining how religious accommodation was originated,
4 how they developed over time, including HB 1523.

5 His testimony is relevant to the constitutional
6 analysis, as I said before, because it's clear that when
7 deciding a challenge under the establishment clause, courts are
8 not only permitted but are required to examine the origins and
9 the context of the statute in order to determine whether
10 there's any secular purpose or instead solely a religious
11 motivation.

12 The next witness you will hear from, Your Honor, is
13 Rabbi Jeremy Simons. Rabbi Simons, who lives here in Jackson,
14 his testimony will be most relevant to our argument that
15 HB 1523 elevates the beliefs of certain religious denominations
16 over other denominations in a way that is constitutionally
17 impermissible. Rabbi Simons will testify that reformed
18 Judaism, and indeed most of American Judaism, does not hold the
19 three religious beliefs advanced in HB 1523 and indeed holds
20 religious beliefs that are exactly the opposite. This is
21 relevant because it shows how HB 1523 impermissibly endorses or
22 preferences certain religions and certain religious views over
23 others.

24 Next you will hear from the plaintiff, who is in the
25 courtroom today, Dr. Susan Hrostowski, who is a plaintiff in

1 this case. She was a plaintiff in the adoption case. She's a
2 life-long resident of Mississippi. She's also an Episcopal
3 vicar. Reverend Hrostowski, like Rabbi Simons, will testify
4 that the Episcopal Church not only does not hold the religious
5 beliefs endorsed by HB 1523 but believes that the teachings of
6 Christ require that all people, indeed including gay and
7 lesbian people, be treated with equal dignity.

8 Reverend Hrostowski will testify to the dignitary and
9 other harms that will face her as a lesbian and her family, her
10 wife and son, as a result of HB 1523. That testimony is
11 relevant not only to standing but to the constitutional
12 balancing test that is required under the establishment clause.

13 The next person you're going to hear from is
14 Dr. Hrostowski's wife or Reverend Hrostowski's wife, Kathy
15 Garner. Ms. Garner is the executive director of the Aides
16 Services Coalition of Hattiesburg. Her testimony will relate
17 to perhaps one of the most ominous and dangerous impacts of
18 HB 1523, one that no one in the legislature, at least that
19 we're aware of, seems to have considered.

20 Kathy Garner will explain that HB 1523 poses a severe
21 risk to the treatment of people with HIV and AIDS in
22 Mississippi, including the very real risk that either people
23 won't get tested for HIV or if they do get tested and test
24 positive, they won't continue on the regimen of drugs that they
25 need in order to stay healthy and to prevent the risk of

1 transmission to others.

2 By expressly allowing medical service providers in
3 Mississippi to refuse to provide counseling to someone who is
4 gay or who has sex -- had had sex outside of marriage, HB 1523
5 creates a very real serious risk of harm, even death, to the
6 state's most vulnerable populations. This testimony is
7 relevant to why HB 1523 fails the balancing test announced by
8 the Supreme Court in *Thornton* and *Cutter*, since it does not
9 take into account the burdens it imposes on others as required
10 by Supreme Court precedent.

11 And last, but certainly not least for today, you will
12 hear from Joce Pritchett, another life-long Mississippi
13 resident, a named plaintiff in the CSE I case and a CSE member
14 who will describe in moving detail how difficult it has been
15 for gay people to live with dignity in the state of
16 Mississippi, how the *Obergefell* decision and this court's
17 decision in CSE I provided a sense of vindication and peace
18 that turned out to be only temporary, and how HB 1523 has
19 returned gay people in Mississippi to the days of fear,
20 hostilities, and even self-loathing. This is relevant both to
21 standing analysis and to the *Thornton* balancing analysis I
22 discussed earlier.

23 Finally, tomorrow, Your Honor, we will be presenting
24 the testimony of our last witness, Dr. Robert Jones, of the
25 Public Research Research Institute. Dr. Jones, who actually

1 grew up here in Jackson and went to college here, will testify
2 about the sharp disagreements between religious Americans and
3 American religious sects about the issues of LGBT equality as
4 well as the fact -- and this is crucial -- that the
5 overwhelming majority of secular Americans do not hold any
6 moral conviction -- I'm going to repeat that, quote, unquote
7 moral conviction -- that gay people should not be permitted to
8 marry. I say that because the words "moral conviction" are in
9 the statute presumably in order to give it a secular purpose.
10 There is no such secular purpose.

11 Dr. Jones' testimony will make crystal clear that the
12 religious beliefs in HB 1523 are held by some religious sects
13 but not by others and that the law creates clear denominational
14 winners and losers in violation of the establishment clause of
15 the United States constitution. Thank you, Your Honor.

16 THE COURT: Mr. Barnes.

17 OPENING STATEMENT BY

18 MR. BARNES: Thank you, Your Honor. Your Honor, we
19 don't anticipate calling any witnesses today, but we will be
20 cross-examining some of the plaintiffs' witnesses and bringing
21 out some facts that we think are critical to the resolution of
22 the issues before the court.

23 The focus today needs to be on the text of HB 1523,
24 not the hype. We have all seen news stories, reports in the
25 media, advocates saying, *This is what this law says. This is*

1 what this law does. This is what this law will permit. We
2 need to concentrate on the text of 1523, what it actually says,
3 what it actually does, as opposed to the way that various
4 constituency groups have interpreted it.

5 HB 1523 is a reasonable accommodation of the free
6 exercise of religion and the protection of freedom of
7 conscious. Both the Supreme Court and the Fifth Circuit
8 foreshadowed conflicts like this when you have the intersection
9 of competing rights, competing fundamental rights.

10 Plaintiffs -- in *Obergefell*, the Supreme Court
11 recognized the right of same-sex couples to marry under the
12 Fourteenth Amendment. But at the same time, both the majority
13 and all of the dissents recognized that the *Obergefell* decision
14 would have a significant impact on those who hold sincerely
15 held religion beliefs that causes them to oppose same-sex
16 marriage. And the Fifth Circuit in its order and ruling after
17 *Obergefell* specifically noted that these conflicts would likely
18 arise, but the court was taking no position on how they should
19 be resolved.

20 Just like a Religious Freedom Restoration Act or RFRA,
21 the way I have commonly heard it shorthanded, this law is a
22 reasonable accommodation because it is intended to alleviate
23 burdens on free exercise and freedom of conscience. After
24 *Obergefell*, it was readily apparent that those who oppose
25 same-sex marriage for religious or moral reasons needed

1 protection. The Supreme Court had made orthodox the view of
2 the plaintiffs, a view that is at odds with the sincerely held
3 religious beliefs and moral convictions of many Americans and
4 many Mississippians.

5 As to the sectarian nature of the beliefs that are
6 specified defined in Section 2 of HB 1523, I believe the
7 evidence will show that not only are these beliefs
8 nonsectarian, they transcend and cross religious and cultural
9 distinctions.

10 The evidence will show that adherence of practically
11 every religion have members who support same-sex marriage and
12 members who oppose same-sex marriage. That's true of the
13 Catholic Church. It's true of the Southern Baptist Church.
14 It's true of the Episcopal Church. So these beliefs can't be
15 limited -- you can't say this is a Christian belief, this is an
16 Episcopal belief, this a Catholic belief.

17 Catholicisms is an interesting point that I'm sure we
18 will explore with Dr. Jones in that the official position, the
19 doctrine of the Catholic Church, as I understand the Pope
20 speaking ex cathedra says that same-sex marriage is a sin. The
21 official doctrine of the Catholic Church opposes same-sex
22 marriage, yet 60 or 70 percent of American Catholics say they
23 favor same-sex marriage. So either they are -- I don't want to
24 call them "bad Catholics," but certainly the basis of those
25 views can't be essentially and inherently religious if the

1 people in that denomination are ignoring the doctrine of their
2 church.

3 I think the evidence will show that for the vast
4 majority of people who support same-sex marriage, they don't
5 consider religious belief. They have other reasons, cultural,
6 scientific, et cetera, for that belief. And even among the
7 those who oppose same-sex marriage, some 43 percent say that
8 the basis of their objection is not religious but is based on
9 scientific, cultural, common sense, other reasons.

10 HB 1523 does not de facto or purport -- it does not
11 immunize anyone from any violation of federal law nor does it
12 purport to. As a matter of fact, HB 1523 specifically
13 recognizes the right to be married and specifically puts the
14 onus on a person, the clerk and if a clerk refuses themselves,
15 puts the onus on that person to take all steps necessary to
16 ensure the issuance of a marriage license is not impeded or
17 delayed. They have to do that in order to claim the
18 protections of the statute.

19 The administrative office of the courts is tasked with
20 the same duties with regard to any judicial recusal. Nothing
21 in 1523 says that someone whose rights are violated is barred
22 from bringing a 1983 suit in federal court to vindicate those
23 rights.

24 The other key -- the key difference between this case
25 from CS -- I keep wanting to say CSI I -- CSE I, the same-sex

1 marriage case, and CSE II, the same-sex adoption case, is that
2 in those cases, in CSE I, Mississippi law specifically banned
3 same-sex couples from being married. In CSE II, Mississippi
4 law specifically banned same-sex couples from adopting.

5 Now, on its face, HB 1523 does none of those things.
6 On its face, HB 1523 says, *We are protecting people who holds*
7 *beliefs. We are protecting religious freedom and moral*
8 *convictions.*

9 Now as to the injuries, as the court noted in its
10 order in the ACLU case and also in the court's ruling denying
11 rehearing, there is a difference between standing and merits
12 and standing -- and whether or not a person is entitled to a
13 preliminary injunction and suffered irreparable harm, even if
14 they have standing to bring a case. And we think that is an
15 important point in this case also, because many of the asserted
16 injuries that plaintiffs have alleged in their complaint are
17 just the type of attenuated, hypothetical conjectural injuries
18 that the court dismissed in the ACLU case rather than the type
19 of concrete and particularized harms that are eminent and
20 likely to occur.

21 The issue today, the primary issue today, is whether
22 the plaintiffs have met their burden to prove that they are
23 going to suffer irreparable and eminent harm that justifies the
24 inclusion, justifies an injunction immediately barring 1523 --
25 HB 1523 from going into effect on July 1.

1 Your Honor, that concludes my opening comments.
2 Defendants do invoke the rule concerning witnesses.

3 THE COURT: All right. All witnesses are parties or
4 either experts. Is that correct?

5 MS. KAPLAN: That's correct. We have fact -- I
6 thought the question was whether they are out of the courtroom.
7 The only witnesses who are in the courtroom right now are
8 either parties or experts.

9 THE COURT: Okay. So fact witnesses are --

10 MS. KAPLAN: Any other fact witnesses are sequestered.

11 THE COURT: All right. Thank you. Thank you,
12 Mr. Barnes. Are the plaintiffs ready to call their first
13 witness?

14 MS. KAPLAN: We are, Your Honor.

15 THE COURT: You may proceed.

16 MS. KAPLAN: We call professor Doug NeJaime.

17 THE COURT: I'm sorry. Mr. Barnes?

18 MR. BARNES: Your Honor, if it please the court, I
19 thought we were going to try to address objections to exhibits
20 beforehand so that we would streamline the process, if the
21 court would like that.

22 THE COURT: Yes. Has the courtroom deputy been
23 provided a copy -- I guess the exhibit list and the witness
24 list the last one -- I'm trying to make sure because there were
25 a couple that came through last night. So I need to make sure

1 that we have the most current exhibit list and witness list
2 from each of the parties. Now, turning --

3 MR. BARNES: Go first, Your Honor?

4 THE COURT: Yes, please. Which ones of the plaintiffs
5 do you have objections to?

6 MR. BARNES: Yes, Your Honor. As to the plaintiffs in
7 the Barber case, as to the declarations of the plaintiffs that
8 they have listed, except to the extent that the witnesses are
9 here and plan to testify live, the State will stipulate for
10 purposes of this hearing only, for the preliminary injunction
11 hearing, that if those witnesses were here testifying live,
12 they would testify consistent with their declarations. But we
13 do object to the consideration of declarations of those who are
14 actually going to be here and testify live. We think that's
15 inappropriate when the court -- when they are here to testify.

16 As for exhibit -- that's exhibits 1 through 10, and 24
17 of those declarations. And as I understand it, that would be
18 declaration 1, declaration 10. Is that right? It's
19 Ms. Mangum-Dear and Carol Burnett, is that correct, Mr. McDuff,
20 that you're planning to offer live?

21 MR. McDUFF: Yes, with respect to --

22 THE COURT: Make sure you're talking into the mic,
23 Mr. McDuff.

24 MR. McDUFF: I'm sorry, Your Honor. With respect to
25 Exhibit 10, Reverend Mangum-Dear will testify. Susan Mangum

1 will not be testifying.

2 THE COURT: Okay.

3 MR. BARNES: And then, Your Honor, as for Exhibits 11
4 through 23, which are basically statements and newspaper
5 reports and comments apparently from various groups, we object
6 to those exhibits as hearsay, some of them containing multiple
7 levels of hearsay. We object to the relevance. We object to
8 the lack of authentication. And we do not think those should
9 be admitted or considered by the court.

10 We do recognize that at a preliminary injunction
11 hearing the court has certain discretion to consider matters
12 that might not be later admissible at trial. However, the lack
13 of admissibility does go to the weight that evidence should be
14 given, as I understand the test. And so we also object that
15 even to the extent the court decides it may consider some of
16 those materials today for preliminary injunction purposes, that
17 we object to the inclusion of those materials in the record for
18 trial, if the court was to combine it -- or if we have trial
19 later.

20 Now, that's it for *Barber*. Would you like me to go on
21 with our objections the other plaintiffs or wait until
22 Mr. McDuff --

23 THE COURT: I'm hear response, if any, from Mr. McDuff
24 as to those objections.

25 MR. McDUFF: Just briefly, Your Honor. Declaration

1 number 10 is -- was signed by a witness who will be testifying
2 and also a witness who will not be testifying so we ask that it
3 be admitted with that understanding.

4 With respect to the remaining exhibits, two of them --
5 one of them is the Jackson city ordinance that is figuring into
6 the legal arguments. Another is a University of Southern
7 Mississippi policy which figures into the legal arguments.

8 And then the remainders are articles, statements,
9 relating to the positions of many employers, businesses,
10 manufacturing groups, the Mississippi Economic Counsel about
11 the adverse economic impact this will have on the state. Those
12 are admitted solely for the purposes of public interest issue
13 with respect to the preliminary injunction standard. And the
14 Fifth Circuit, of course, has held that at the preliminary
15 injunction stage the procedures in the district court are less
16 formal and the district court may rely on otherwise
17 inadmissible evidence, including hearsay evidence.

18 These things are not in dispute, that is, the
19 Mississippi Manufacturing Association made the statement it
20 made. So I believe it is appropriate in these circumstances to
21 admit them for purposes of this hearing with the understanding
22 that the State is not waiving any objection that it might have
23 at any future proceeding.

24 THE COURT: Thank you, Mr. McDuff. Mr. Barnes, any
25 rebuttal?

1 MR. BARNES: No, Your Honor. And as for Exhibit 10,
2 with that understanding, then we would agree with that one.
3 The same stipulation as to the other declarations with respect
4 to the plaintiff who's not here, that she would testify
5 consistent with that if she was here for purposes of this
6 hearing only.

7 Other than that, Your Honor, the court's prepared to
8 rule. I'm prepared to move on to the plaintiffs' second list.

9 THE COURT: For purposes of this hearing, all
10 exhibits -- that motion is going to be -- those objections are
11 going to be overruled. For purposes of this hearing all
12 exhibits to the -- except for the declarations of those who are
13 testifying live today and/or tomorrow, except for those
14 exhibits, which is Exhibit 1, I believe, and a portion of, if
15 you will, Exhibit 10 that was a declaration that was signed off
16 by multiple people, only one of whom will be testifying, but
17 the declaration is admissible as to the other persons who will
18 not be testifying and on behalf of the church too, which may or
19 may not be testifying.

20 So all exhibits, except for Exhibit Number 1, are
21 admitted into evidence and will be made a part of these
22 proceedings with the understanding that later objections may be
23 made if this matters is to proceed beyond trial.

24 MR. BARNES: Thank you, Your Honor. With respect to
25 the plaintiffs' list in the Campaign for Southern Equality

1 case -- and I'm sure my colleagues will correct me if they are
2 wrong, they sent me an e-mail last night saying that they were
3 intending to offer certain of these exhibits. If I missed one,
4 please let me know.

5 First of all, they are going to plan to offer
6 Exhibit 2, 5, 6, 7, 8, 9, and 10. I'd like to address those
7 first. Your Honor, we object to these, again, as hearsay.
8 Some of them contain multiple levels of hearsay. We object to
9 the relevance. We object to the lack of authentication of
10 those exhibits, that is, numbers 2, 5, 6, 7, 8, 9 and 10. It
11 is my understanding plaintiffs do not intend to offer Exhibits
12 1, 3, and 4.

13 Your Honor, as for their -- also it is my
14 understanding plaintiffs are not planning to offers Exhibits
15 11, 12 or 13, on their list. They do plan to offer Exhibits
16 14, 15, and 16. Again we object to those exhibits on the basis
17 of authentication, hearsay, and multiple levels of hearsay and
18 relevance.

19 As to exhibits -- then again I apologize, Your Honor.
20 Let me cover everything. It's my understanding that plaintiffs
21 do not intend to introduce Exhibits 17 through 25 on their
22 list. As to Exhibits 26 and 27, the CVs of the two prospective
23 experts, we don't object to those, Your Honor. They are just
24 the CVs. We agree those would be proper.

25 Exhibit 28, the unofficial transcript of the

1 legislative debate regarding HB 1523, we object to that. It is
2 unofficial. Mississippi has no official legislative history,
3 and the floor debate reflects only a small portion of whatever
4 consideration the legislature as a whole and legislators
5 individually might have given to the passage of HB 1523 and so
6 it would reflect an inaccurate portrayal of that.

7 We object to Exhibit 29 on the basis again of
8 relevance, hearsay, lack of authentication.

9 On Exhibits 30 and 31 -- Exhibit 30. Let me take that
10 first. It is my understanding that Dr. Hrostowski -- Reverend
11 Hrostowski -- the Reverend Dr. Hrostowski, excuse me, I
12 apologize -- is planning to testify live. So we would object
13 to the admission of that declaration and any exhibit thereto
14 she can address in her live testimony.

15 It is my understanding that plaintiff's last Exhibit
16 CSE-31, the declaration of Jasmine Beach Ferrara, it is our
17 understanding that she is not intending -- plaintiffs are not
18 planning to call her. To the extent she's unavailable, we
19 would stipulate as we did with Mr. McDuff's client that if here
20 and available to testify live, she would testify consistently
21 with her affidavit.

22 Now, we do have objections to the exhibits to these
23 two affidavits, and again there are similar exhibits that we
24 have to other -- made to others based on authentication,
25 hearsay, lack of relevance -- I apologize, Your Honor. For

1 purposes of our objections, we object to all of those exhibits
2 on those grounds of authentication, relevance, hearsay and
3 multiple levels of hearsay. And those are our objections, Your
4 Honor.

5 Can I have a moment?

6 THE COURT: You may.

7 (Short Pause)

8 MR. BARNES: I apologize. For purposes of not
9 interrupting the flow of the hearing, may we have the
10 stipulation that an objection for one of the defendants is an
11 objection for all?

12 THE COURT: Yes.

13 MR. BARNES: Thank you.

14 THE COURT: Any response from the plaintiff?

15 MS. KAPLAN: Yes, Your Honor. Exhibits 5 through 10,
16 14 through 16 and 29 will all be coming in through the
17 testimony of expert witnesses, and for those reasons I don't
18 think -- as well as the reason Mr. McDuff said about the Fifth
19 Circuit in preliminary injunction hearings, I don't think the
20 objections stand.

21 Exhibit 2, which is the one about the Episcopal
22 Church -- and I apologize. I misspoke. 5 through 10, which
23 are the positions of reformed Judaism on the issues presented
24 by HB 1523 are all, we believe, Your Honor, in addition to the
25 preliminary injunction standard constitutional facts. When a

1 court is deciding -- what I mean by that, there's a
2 constitutional fact doctrine that provides that when a court is
3 deciding issues like an issue under the establishment clause
4 and needs to determine facts relevant to that constitutional
5 determination as opposed to a more ordinary fact in a case that
6 says who did this, who said what, et cetera, the court is
7 permitted great latitude in consideration those facts, and the
8 traditional rules of evidence don't apply.

9 So we think not only would they come in under the kind
10 of stipulation that you talked about with Mr. McDuff in terms
11 of a preliminary injunction hearing, but they are clear -- I
12 can't think of a more clear example of facts that would come in
13 with the constitutional fact doctrine.

14 Exhibit 28, which is the unofficial transcript of the
15 legislative hearings we submitted -- and I can put it in an
16 affidavit if you want on that, Your Honor. We submitted the
17 tape that we received to an official transcription service in
18 New York City and they transcribed it.

19 As I said earlier in my opening and is clear under the
20 law, that the legislative history as well as the statements of
21 legislators are properly considered as evidence as to whether a
22 statute was enacted with an impermissible purpose of advancing
23 religion under the establishment clause. I have a Fifth
24 Circuit cite for that, Your Honor. That would be *School Board*,
25 274 F.3d 289.

1 And same thing with the Jasmine Beach Ferrara
2 affidavit. The exhibits attached to those are the official
3 position of the United Church of Christ on these issues. Again
4 the court is completely entitled to consider those in
5 connection with the Constitutional Facts Doctrine as well as
6 the preliminary injunction standard.

7 With respect to Ms. -- Reverend Beach Ferrara's
8 testimony, as an officer of the court I have to tell you she is
9 here. She is present. We submitted the affidavit and declined
10 to have the testimony frankly in an effort to expedite things.
11 If the State insists, we can put her on the stand, but that's
12 why we did it that way.

13 MR. BARNES: Your Honor, with regards to that
14 declaration, we'll make the same stipulation regarding the
15 other declarations of plaintiffs, that if they were here live
16 she would testify consistently with that testimony for purposes
17 of this hearing. We'll stipulate to that.

18 Your Honor, might I be heard for brief rebuttal, if
19 Ms. Kaplan is through?

20 THE COURT: Yes.

21 MR. BARNES: Your Honor, I think our confusion over
22 Exhibits 5 through 10 kind of point out how difficult it is to
23 prepare for a hearing such as this on short notice and without
24 any expert disclosures. It was my understanding that
25 plaintiffs have said they are calling two expert witnesses.

1 That's Professor NeJaime and Dr. Jones. It was our
2 understanding that Rabbi Simons was not going to be called as
3 an expert witness.

4 MS. KAPLAN: That is correct. I apologize. I
5 corrected that. 2, 5 through 10 are coming through through
6 fact witnesses.

7 MR. BARNES: I'm sorry. Then I missed -- I apologize
8 if I missed that correction. But, Your Honor, we disagree with
9 the plaintiffs that these can be considered. Without meeting
10 other evidentiary standards, we believe they still have to meet
11 the same standards as any other evidence.

12 One moment.

13 (Short Pause)

14 MR. BARNES: That's all the objections we have, Your
15 Honor. And then after the court rules on these, we request
16 that we also get a rulings on any objections plaintiffs have to
17 our exhibits so that we can then just move ahead.

18 THE COURT: Okay. Thank you, Mr. Barnes. I'm only
19 going to speak to the exhibits which the court understands that
20 the plaintiffs will seek to admit and the objections related to
21 those exhibits. With respect to Exhibit 2, 5, 6, 7, 8, 9 and
22 10, what witness would those exhibits becoming through,
23 Ms. Kaplan?

24 MS. KAPLAN: Yes, Your Honor. 2 will be coming
25 through Reverend Dr. Susan Hrostowski, and 5 through 10 will be

1 coming through Rabbi Simons. Excuse me. 10 will be coming in
2 through the expert. So 5 through 9 will be coming in through
3 Rabbi Simons. 10 actually comes in through Professor NeJaime.

4 THE COURT: When does the plaintiff anticipate calling
5 Mr. Simons?

6 MS. KAPLAN: Rabbi Simon is our second witness.

7 THE COURT: Court will reserve ruling on 5, 6, 7, 8,
8 and 9 until it has had an opportunity just to see what those
9 exhibits are. Exhibit 10 the objections are overruled. I
10 think for purposes of preliminary injunction, the court can
11 review those. In response to Exhibit 2, going back because I
12 have not spoken to that, the court will take that one up before
13 Ms. Hrostowski testifies along with Exhibit 30. So I'm
14 reserving ruling on Exhibit 2 and Exhibit 30. Exhibits 14, 15,
15 and 16, is this stuff that the experts will be speaking on?

16 MS. KAPLAN: It is, Your Honor.

17 THE COURT: Okay. 14, 15 and 16, the objections to
18 those will be overruled. Again, for purposes of this
19 preliminary injunction, the court finds a need to have to
20 review -- will take that -- those things into consideration.

21 The next exhibit I see is Exhibit 26. Well --

22 MR. BARNES: No objection to that one.

23 THE COURT: 26, 27, there are no objections there.
24 And then the next one is Exhibit 28. For purposes of this
25 hearing -- and the court understands that Mississippi has no

1 official legislative history. But if I'm understanding, the
2 transcript that was made of these hearings was taken from the
3 videotapes of the legislative session that I guess in the last
4 year or two is a function that the Mississippi College School
5 of Law, I believe, has taken up and has done a great service to
6 this state in that regard. And so the court will not accept it
7 as the official transcript, but the court obviously could see
8 the video itself and will know what was said during the
9 legislative debate because there's an actual recording of it.
10 But kudos again to Mississippi College School of Law for doing
11 that. So the objection to 28 is overruled.

12 The court is going to overrule those objections and
13 again for purposes of this preliminary injunction hearing, I
14 think the court can consider the -- are the videotapes
15 themselves a part of the evidence or simply the transcript or
16 could -- or do the transcripts point the court directly to the
17 portion of the video or whatever so that the court could look
18 at it independently if it decides?

19 MS. KAPLAN: Yes, Your Honor. It is my
20 understanding -- I need to correct that. We actually -- it's
21 on the Internet. You go out to the Mississippi thing and you
22 can watch it on the Internet. But we would be happy to
23 undertake to convert that into a DVD and present it to the
24 court. We have folks who can do that.

25 THE COURT: We can go to the Internet. We have

1 actually gone to the Internet. Again it's a great service that
2 Mississippi College School of Law has undertaken.

3 MR. BARNES: Your Honor, and, of course, we certainly
4 appreciate the contributions that the Mississippi College
5 has --

6 THE COURT: And I'm not trying to give them a plug,
7 but I know it sounds like it.

8 MR. BARNES: But, you know, credit where credit is
9 due, Your Honor. A part of our objection is the fact that we
10 haven't had time to listen to the several hours of debate again
11 in order to compare it with the transcript. And so we --
12 today as we stand here, we can't agree that it accurately
13 represent it or not. We understand the court has ruled. I
14 just want to make it clear that was part of our issue.

15 THE COURT: Okay. Thank you, Mr. Barnes. So that
16 objection is overruled. Exhibit Number 29 is the next one. Is
17 there still an objection to that particular exhibit,
18 Mr. Barnes? I was not clear.

19 MS. KAPLAN: I want to clarify that too will be coming
20 in through an expert.

21 THE COURT: Which expert is that?

22 MS. KAPLAN: Professor NeJaime.

23 MR. BARNES: We still object to it, Your Honor, on the
24 basis I previously stated.

25 THE COURT: Thank you, Mr. Barnes. The court is going

1 overrule the objection. The court has already advised the
2 parties with respect to the declaration and the exhibits
3 attached to the Exhibit 30. The court is going to reserve
4 ruling on those until it has an opportunity to at least review
5 those documents. And Exhibit 31, there is no objection to 31
6 now that the plaintiffs will not be calling Reverend Jasmine
7 Beach Ferrara. Is that the party's understanding?

8 MR. BARNES: Yes, Your Honor. I believe I have stated
9 our position in the stipulation for the record. I don't want
10 to go through it again, but same stipulation that we previously
11 made.

12 THE COURT: So Exhibit 31 will be admitted.

13 Now I turn to the parties for the Barber plaintiffs.
14 Does Barber plaintiffs have any objections to the
15 government's -- to the defendant's exhibits?

16 MR. McDUFF: I don't. Those basically pertain to
17 issues that Ms. Kaplan's witnesses are dealing with so I will
18 let her state whether she has any objections. I do not have
19 any that she doesn't have.

20 THE COURT: Okay. All right. Ms. Kaplan, are there
21 any exhibit -- excuse me, are there any objections to the
22 defendant's exhibits?

23 MS. KAPLAN: Yes, Your Honor. We assume from looking
24 at the exhibits that they intend to use them on
25 cross-examination of Dr. Jones. And if that's the case, we

1 have no objection.

2 THE COURT: All right. Is that a fair representation
3 of how those exhibits will be used, Mr. Barnes?

4 MR. BARNES: Your Honor, that's one way we intend to
5 use them. It may not be the only way.

6 THE COURT: Okay. All right. Well, if they are good
7 for one way, they are going to be good for all the ways. All
8 right.

9 So now it's time for us to call our first witness, but
10 before we do that we're going -- I think this a good time to
11 take about a ten-minute break for everyone. Report back in
12 about ten minutes, and we'll begin the testimony.

13 (Recess)

14 THE COURT: Mr. Barnes?

15 MR. BARNES: I apologize, Your Honor. One point of
16 clarification. The court has ruled on our objections made on
17 the record. Can we have a stipulation we have continuing
18 objections so we don't have to keep popping up and down like a
19 jack-in-the-box?

20 THE COURT: Yes.

21 MR. BARNES: Thank you.

22 THE COURT: So you won't keep hearing overruled all
23 the time. We just have to make this thing here -- add some
24 levity to it.

25 MS. KAPLAN: I told Mr. Barnes, Your Honor, that I

1 didn't want to see him popping.

2 MR. BARNES: I was just thinking my legs were going to
3 get tired. But I understand, Your Honor.

4 THE COURT: Okay. All right. Is the plaintiff ready
5 to call its first witness?

6 MR. KAYE: We are, Your Honor.

7 THE COURT: You may proceed.

8 MR. KAYE: Plaintiffs call our first witness,
9 Professor Douglas NeJaime.

10 THE COURT: Okay.

11 (Witness Sworn)

12 MR. GOODWIN: Your Honor --

13 THE COURT: Mr. Goodwin?

14 MR. GOODWIN: Your Honor, before the professor begins
15 his testimony, we'd like to make an objection as to him being
16 called today on two grounds. Number one, we've not been
17 provided with any kind of a disclosure, expert disclosures,
18 prior to the hearing. We have his CV. So we know who he is
19 and generally what he does, but we have no idea or we did not
20 have an idea until just moments before the hearing what the
21 subject matter of his testimony would be. As a result of that,
22 we're unduly prejudice in our ability to cross-examine him
23 effectively. That's number one.

24 Number two, there's no need, Your Honor, for what is
25 going to amount to a legal expert in this case. The

1 plaintiffs' counsel are very capable, and our briefs outline
2 the issues for the court, and he's simply -- if he's going to
3 testify with regards to cases that are similar to this, cite
4 law journals, things of that nature, those things are covered
5 in the briefs and will be covered by the arguments of counsel,
6 Your Honor. And for those reasons, we would object to his
7 testimony.

8 THE COURT: All right. Any response?

9 MR. KAYE: Just two points, Your Honor. First,
10 Professor NeJaime's name was disclosed last Friday, and we
11 would have been happy to disclose the nature of his testimony
12 had we been asked. And, second, we're not planning to offer
13 Professor NeJaime as a legal expert. He's going to be
14 testifying about facts that we believe will be helpful to the
15 court in line with the Supreme Court precedent that makes clear
16 that the court can and should consider the context in which
17 policies that are challenged under the establishment clause
18 arose.

19 THE COURT: Okay. Any response, Mr. Goodwin?

20 MR. GOODWIN: Yes, Your Honor. Despite the
21 characterization of what he may testify, we still see that as a
22 legal expert; and for the same reasons I've stated, we would
23 object.

24 THE COURT: Okay. I'm going to give you some leeway
25 to figure out what it is that this witness can offer. The -- I

1 realize you said you disclosed his name and the other side did
2 not request anything. But under Rule 26, the obligation to
3 disclose is on the party who's putting forth the witness. It
4 really doesn't matter if the other side doesn't ask for it.
5 But I don't know if the other side has been sufficiently
6 prejudiced, however, at this point because I don't even know
7 what the testimony might be. So we'll get through this witness
8 some kind of way. So I'll allow you to raise any objections
9 during the course of his testimony, and we'll take those up
10 then.

11 MR. GOODWIN: Thank you, Your Honor. I guess to
12 clarify our position, if he's speaking as to simply facts based
13 on cases, that's one thing. If he begins to opine and issue
14 opinions about what cases mean, what decisions mean, that sort
15 of thing, that's the issue that we have.

16 THE COURT: All right. Otherwise he could come up
17 here and do it. Right? We are just trying to keep this thing
18 real. This is a two-day hearing.

19 MR. KAYE: Your Honor, I would just also note just for
20 the record that the disclosure on last Friday had Professor
21 NeJaime's address at the UCLA law school. So I think that to
22 some extent at least served as a disclosure of who he is and
23 what he would be doing here. Just wanted to make the record
24 clear. May I begin?

25 THE COURT: You may.

1 DOUGLAS NEJAIME,

2 Having first been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. KAYE:

5 Q Professor, will you please state your name for the record.

6 A Douglas NeJaime.

7 Q And Professor NeJaime --

8 THE COURT: I usually give this thing about that is
9 the mic before you. Please, Professor, make sure that you
10 speak in -- you don't have to speak directly into it, but speak
11 loudly and clearly enough for the court reporter to hear you
12 and speak at a pace at which she can keep up with you and try
13 to avoid speaking at the same time as the attorney. Make sure
14 all your responses are verbal.

15 THE WITNESS: Yes, sir.

16 BY MR. KAYE:

17 Q Professor NeJaime, what is your profession?

18 A I'm a law professor at UCLA School of Law, and I'm also the
19 faculty director of the Williams Institute at UCLA.

20 Q What's the Williams Institute?

21 A It's a research institute that focuses on sexual
22 orientation and gender identity law and policy and does both
23 legal and social science research on those topics.

24 Q How long have you been a professor of law?

25 A I've been professor of law for eight years.

1 Q Where do you teach?

2 A At UCLA School of Law for two years, at UC Irvine School of
3 Law, and before that at Loyola Law School.

4 Q And --

5 THE COURT: Which Loyola?

6 THE WITNESS: Los Angeles.

7 THE COURT: Okay. Thank you.

8 BY MR. KAYE:

9 Q In advance of testifying here today, did you provide us
10 with a copy of your CV?

11 A Yes.

12 MR. KAYE: Honor, may I approach?

13 THE COURT: Yes, you may.

14 BY MR. KAYE:

15 Q Professor NeJaime, I've handed you the document that's been
16 premarked as CSE Exhibit 27. Do you recognize this document?

17 A Yes.

18 Q What is it?

19 A My CV.

20 Q Thank you. Would you describe your educational background.

21 A I received my A.B. from Brown University where I
22 concentrated in American civilization and my J.D. from Harvard
23 Law School where I was senior editor of the *Harvard Civil*
24 *Liberties Law Review*.

25 Q What are your responsibility as a faculty director at the

1 Williams Institute?

2 A In addition to a lot of administrative responsibilities, I
3 oversee research in some of our major research areas, including
4 research on religious exemptions, which we study from both a
5 legal and social science perspective to understand the impact
6 of religious exceptions on the LGBT population.

7 Q What are your research topics as law professor at UCLA?

8 A As law professor, my own research involves religious
9 accommodations, family formation, and family recognition and
10 the relationship between law and social movements with primary
11 emphasis on the LGBT movement and the Christian right movement.

12 Q And within the field of religious accommodations, do you
13 have any particular areas of study?

14 A So I do focus on the history and the evolution of religious
15 accommodations in the U.S. as well as the role of social
16 movement actors, including primarily Christian right
17 organizations and their leaders in advocating for those types
18 of religious accommodations.

19 Q About how many religious accommodation statutes, laws, have
20 you read and studied in the course of your career?

21 A More than 100.

22 Q And aside from reading those laws, how else do you study
23 religious exemption, religious accommodations bills?

24 A So my research involves, of course, examining legislation
25 and judicial decisions as well as secondary literature and

1 research on the topic but also analysis of primary source
2 materials from the organizations that are advocating or
3 opposing these laws. So that involves reviewing an
4 organization's materials that they put out themselves, other
5 materials that are in the public record, including things they
6 have submitted in legislative bodies or to courts, as well as
7 media accounts and interviews that they have given to the media
8 as well as in some of my earlier work interviews of actors at
9 organizations themselves.

10 Q Okay. Have you published any articles that discussed the
11 role of Christian advocacy groups in regards to religious
12 accommodations or religious exemption laws?

13 A Yes, specifically with regard to religious exemptions, a
14 recent article in the *Yale Law Journal* in 2015 called
15 "Conscience Wars," which examined the role of Christian right
16 organizations in advocating for religious accommodations, a
17 2012 article in the *California Law Review* which examined
18 specifically the relationship between proposed religious
19 exemption statutes and marriage for same-sex couples and LGBT
20 antidiscrimination law, and a 2009 article in the *Harvard*
21 *Journal of Law and Gender* that examined religious
22 accommodations efforts in public school context, including with
23 regard to curriculum.

24 Q Have you published any books that address this topic?

25 A I have a case book titled *Cases and Materials*. The new

1 title will be *Cases and Materials on Sexuality, Gender*
2 *Identity, and the Law*, and that includes sections of which I'm
3 the primary author on the relationship between religious
4 accommodations and same-sex marriage and LGBT
5 nondiscrimination.

6 Q Are you a member of any professional associations?

7 A In addition to Williams Institute, I'm a member of the Law
8 and Society Association as well as a member of the Religious
9 Accommodations Working Group out of the University of Southern
10 California.

11 Q Have you --

12 THE COURT: Excuse me. Let me interrupt you for just
13 a second. The *National Law Journal* article that you mentioned
14 in 2015, is it on your CV?

15 THE WITNESS: It should be, yes. It's *Yale Law*
16 *Journal* from 2015.

17 THE COURT: *UCLA Law Journal*?

18 THE WITNESS: *Yale Law Journal*.

19 THE COURT: *Yale Law Journal*. I apologize. Okay.

20 "Conscience Wars." Is that it?

21 THE WITNESS: Yes.

22 THE COURT: Thank you. I'm sorry.

23 MR. KAYE: Oh, please.

24 BY MR. KAYE:

25 Q Professor NeJaime, have you served as an expert witness

1 before?

2 A No.

3 Q Are you being paid for your services today?

4 A No, but my travel is being reimbursed.

5 MR. KAYE: Your Honor, I offer Professor NeJaime as an
6 expert on the field of history of religious accommodations
7 statutes and the role of Christian right organizations in
8 advocating for these laws.

9 THE COURT: Any objection?

10 MR. GOODWIN: Your Honor, simply renewing the
11 objections we have had previously, we do not need any voir dire
12 of the witness.

13 THE COURT: Okay. Thank you. Professor NeJaime will
14 be tendered as an expert witness on the area of history of
15 religious accommodations statutes and --

16 MR. KAYE: The role of Christian right organizations
17 in advocating for those laws.

18 THE COURT: And for those reasons.

19 MR. KAYE: Thank you, Your Honor.

20 BY MR. KAYE:

21 Q Professor NeJaime, what were you asked to do in this case?

22 A I was asked to provide expert testimony on the history and
23 evolution of religious accommodations in the U.S. and the role
24 of organizations and leaders of the Christian right movement in
25 advocating for religious accommodations.

1 Q What are religious accommodations?

2 A Generally when we use the term "religious accommodation,"
3 we mean an exemption from a generally applicable law, so a law
4 that the legislature passes that binds everyone in the society
5 and someone based on their religious beliefs or practices seeks
6 to not have the obligations imposed by that law imposed on
7 them.

8 Q Thank you. When did religious accommodations first arise
9 in the United States?

10 A So we have a long tradition of some forms of religious
11 accommodations, but our constitutional free exercise law was
12 not read to provide exemptions from generally applicable laws
13 as a general matter until the 1960s.

14 Q Okay. And starting in the 1960s, what rights were those
15 religious accommodations directed at protecting?

16 A So generally people were claiming that their ability to
17 practice their religion or engage in ritual religious practice
18 was being infringed by some generally applicable law.

19 Q Can you give as you examples of that?

20 A So classic examples would be unemployment benefits. So in
21 order to collect unemployment benefits, the individual has to
22 be fired from their position and not for cause. And for
23 individuals who, for instance, observe a Saturday sabbath and
24 weren't able because of their religious faith to work on
25 Saturdays, they were denied unemployment benefits. And courts

1 said that they would get a religious exemption such that they
2 could qualify for unemployment benefits because their religious
3 obligations forced them not to work on Saturdays.

4 Other examples would be criminal drug laws so some minority
5 religious faith groups engage in ritual use of what would be on
6 banned substances lists, and they have asked for exemptions
7 from the laws that otherwise ban those substances so that they
8 can engage in their ritual use.

9 Q Now, you were referring to these as constitutional
10 protections. Did there come a time when that changed?

11 A Yes. The Supreme Court in 1990 in *Employment Division v.*
12 *Smith* interpreted the free exercise clause in a way that meant
13 that there would not ordinarily be religious exemptions as a
14 matter of constitutional --

15 MR. GOODWIN: Objection, Your Honor, as to expressing
16 a legal opinion.

17 THE COURT: Objection overruled.

18 BY MR. KAYE:

19 Q You can continue.

20 A That there would not ordinarily be exceptions from
21 generally applicable laws as a matter of constitutional free
22 exercise law.

23 Q And what was the reaction to that turn of events?

24 A So there was bipartisan reaction against that decision
25 which led Congress to pass the Religious Freedom Restoration

1 Act in 1993.

2 Q What was the -- you described the nature of the support for
3 that 1993 bill?

4 A The Religious Freedom Restoration Act, RFRA, passed with
5 near unanimous support in the senate and was supported by
6 organizations across the political spectrum as well as
7 organizations from a range of religious positions. So you have
8 large evangelical Christian organizations, eventually Catholic
9 organizations, small minority faith organizations and
10 organization like the ACLU all working in coalition to pass
11 that legislation.

12 Q Okay. Are there other similar laws that have been passed
13 across the country?

14 A Yes. So there are 21 states that have their own Religious
15 Freedom Restoration Acts, RFRAs, and many of those acts were
16 passed in the wake of a U.S. Supreme Court decision in 1997
17 ruling that Congress had exceeded its authority in applying
18 RFRA to the states and so states then passed their own
19 Religious Freedom Restoration Acts.

20 Q What was the nature of the support for those state-based
21 RFRAs?

22 A So many of those state-based RFRAs also had strong
23 bipartisan support and were supported by larger evangelical
24 Christian and Catholic organizations as well as by small
25 minority faith groups and by the ACLU.

1 Q Now, were there -- did there come a time when the nature of
2 support for these types of bills changed?

3 A Yes. So in the past I would say five years or so, we have
4 really seen a shift in the kinds of support that RFRA's and
5 other religious exemption statutes have. So it's become much
6 more an effort that's supported by the major religious
7 organizations and Christian right organizations seeking to make
8 claims on religious exemption, and some of the groups that had
9 previously supported RFRA's like the ACLU, have withdrawn their
10 support from those types of laws.

11 Q What caused that change?

12 A So there's obviously, you know --

13 MR. GOODWIN: Your Honor, objection as to speculation.

14 THE COURT: Objection overruled.

15 A Many things contributed to these shifts, but one major
16 source of the shift has been the attention explicitly by
17 Christian right organizations to attempt to pass religious
18 exemption statutes as a response to same-sex marriage and LGBT
19 antidiscrimination law.

20 BY MR. KAYE:

21 Q That was starting about when?

22 A So we saw attention being given to religious liberty claims
23 soon after the Massachusetts Supreme Judicial Court recognized
24 same-sex marriage in 2003, but we didn't see elaborate
25 exemption regimes being proposed until 2009 when states started

1 to legislatively move towards recognition of same-sex marriage.

2 Q And you mentioned elaborate exemption regimes. What do you
3 mean by that?

4 A Exemption regimes that are actually providing the
5 conditions under which an exemption might be granted, and not
6 that these became law but these kinds of drafts that were
7 circulating. So if the kinds of claims I was talking about
8 previously were about one's ability to engage in their
9 religious practices, these were exemption statutes and claims
10 that were attempting to shield from liability individuals who
11 had objections to interacting with by providing goods or
12 services to others who might be protected by law, for instance,
13 same-sex couples who now had the ability to marry or in some
14 states were protected by antidiscrimination law.

15 Q Did the *Windsor* decision from the Supreme Court and the
16 *Obergefell* decision have an impact on how many of this new type
17 of religious accommodation laws were introduced?

18 A When *Windsor* recognized same-sex couple's marriages for
19 purposes of federal law, obviously it was clear that the
20 federal courts were playing a more significant role in the
21 same-sex marriage effort, and many states were responding at
22 that time by looking at religious exemption issues, and
23 Christian right advocates were putting forward many religious
24 exemption bills, including RFRA as well as other kinds of
25 religious accommodation statutes.

1 After *Windsor* in the 2015 legislative session, we counted
2 more than 50 bills across state legislatures that included
3 religious exemptions in the LGBT context specifically. And
4 after *Obergefell*, which recognizes same-sex couple's right to
5 marry nationwide, that really accelerated. So in the 2016
6 legislative session, we have over 100 religious exemption bills
7 across more than 20 state legislatures.

8 Q And how many of those bills have actually passed, been
9 signed into law?

10 A So in the 2015 legislative session, five of those bills
11 were enacted. And in the 2016 legislative session, two of
12 those bills were enacted.

13 Q Including Mississippi?

14 A Correct.

15 Q Okay. I'd like to shift focus a little bit and talk about
16 the nature of the organizations that support those laws. Could
17 you describe those a bit?

18 A So the religious exemption statutes that we've seen
19 introduced in state legislatures are supported by both
20 state-based organizations. So many states have some type of
21 family policy institute that supports state legislative efforts
22 and that receive support from national organizations. And so
23 there are prominent Christian right national organizations that
24 have been advocating for religious exemptions in state
25 legislatures and most prominently including groups like the

1 Family Research Council, the Alliance Defending Freedom, the
2 American Family Association.

3 Q I'd like to ask you about the Alliance Defending Freedom
4 for a minute. What are the origins of that organization?

5 A So ADF was originally founded as the Alliance Defense
6 Fund -- that changed its name to Alliance Defending Freedom --
7 in 1994 by leaders of the Christian right with the express
8 purpose of seeing Christian principles enacted into law. It
9 was focused on litigation. So it was an attempt to respond to
10 the litigation efforts of the left and organizations like the
11 ACLU to have an organization representing the Christian right
12 that was engaging in court-centered strategies rather than just
13 political and electoral politics as a strategy and at first,
14 was founded as a sort of clearinghouse that would coordinate
15 and fund litigation efforts but grew into a very well-resourced
16 litigation organization in its own right.

17 Q And at some point did the focus of ADF expand beyond its
18 court-centered strategy?

19 A Yes. So ADF places a lot of emphasis on litigation
20 strategies but has clearly become involved in legislative
21 efforts around the country as well as in policy and other
22 government institutions.

23 Q I'd like to talk about that more in a bit. But first does
24 the ADF associate itself with any particular religion?

25 A It doesn't associate itself with a denomination but seeks

1 to advance what it deems to be Christian principles.

2 Q Okay. And what are the core issues for ADF's mission?

3 A So ADF would describe like many Christian right
4 organizations its mission as involving life, marriage and the
5 family, and religious liberty. And what that means is life
6 includes abortion, and the marriage and the family is about
7 marriage being a union between a man and a woman. And
8 religious liberty means to some extent religious exemptions
9 from kind of laws that depart from the views on the life and
10 family plans.

11 Q What exactly is ADF's conception of the family?

12 A So a lot of leaders --

13 MR. GOODWIN: Objection to speculation, Your Honor.

14 MR. KAYE: Your Honor, this is a field study.

15 THE COURT: Objection overruled.

16 A A lot of leaders in the Christian right would describe the
17 view of the family as what they term the natural family. And
18 when they use the term "natural family," what they really mean
19 is heterosexuality, sexual procreation, and men and women
20 filling distinct roles in the family.

21 And so what they mean by that is that sex should be only
22 within marriage, marriage is between a man and a woman, sex
23 should have procreative purposes, and men and women should
24 raise their biological children, and that men and women as a
25 matter of biological destiny fill different roles with regard

1 to parenting and the family.

2 BY MR. KAYE:

3 Q Okay. What is your basis for believing that this is ADF's
4 view?

5 A So I reviewed many of ADF's materials as well as the views
6 they put forward in public documents that they submit. They've
7 been actually quite straightforward about their views about
8 these issues and specifically their views about the
9 relationship between same-sex couples and marriage and family.

10 Q When you say they have been quite clear about it, what do
11 you mean by that?

12 A They have long opposed same-sex marriage. They have filed
13 briefs in cases opposing same-sex marriage. They also filed
14 briefs in cases opposing the decriminalization of same-sex sex.
15 So in *Lawrence v. Texas*, the 2003 case, they filed a brief
16 opposing the overturning of *Bowers v. Hardwick*, which had
17 upheld the constitutionality of sodomy bans.

18 In that case, they explicitly targeted homosexuality
19 distinguishing heterosexual sodomy from homosexual sodomy. The
20 leader of ADF, Allen Sears, published a book called *The*
21 *Homosexual Agenda*, which is subtitled About the Assault on
22 Religious Liberty, and in that book described homosexuality as
23 a sin and as against Christian principles and specifically also
24 as a threat to society and a threat to public health.

25 Q How does ADF work to advance its agenda?

1 A So ADF engages in litigation, and they will litigate their
2 own cases. They will defend parties in litigation, and they
3 will also, as a mentioned, file amicus briefs in litigation.
4 And more recently they have been involved in legislative
5 efforts either providing legislative testimony and speaking at
6 hearings in state legislatures or in some instances submitting
7 draft legislation to state legislatures.

8 Q Okay. Are there any organizations that share ADF's goals?

9 A Yes. So ADF works really in coalition with other
10 organizations than the Christian right. So organizations like
11 the family research counsel share the goals of ADF, and many of
12 these organizations, their leaders signed what's called the
13 Manhattan Declaration, which is subtitled "A call of Christian
14 Conscience," which brings together these planks of life,
15 marriage, and the family and religious liberty. And Allen
16 Sears, for instance, is one of the signatories along with other
17 leading Christian right organization founders.

18 Q Are there nonreligious groups that you're aware of that are
19 also advocating for the same kind of religious accommodation
20 laws that ADF and groups like it are advocating for?

21 A I'm not aware of secular groups that are engaging in those
22 efforts and certainly none that have significance in terms of
23 resources or power.

24 Q Thank you. I'd like to move focus now to the state of
25 Mississippi and HB 1523. In advance of today's testimony, did

1 you review statements made by legislators during hearings for
2 that bill?

3 A Yes.

4 Q Okay.

5 MR. KAYE: Your Honor, may I approach?

6 THE COURT: Yes, you may.

7 BY MR. KAYE:

8 Q Professor NeJaime, I'd like to direct your attention to
9 page 33 of the first day of testimony here. Is there anything
10 on this page that stood out to you in your review of this
11 transcript?

12 A So this passage is clearly about the religious principles
13 embodied here.

14 Q Would you read the portion that --

15 A The legislator says, "It's very clear what God says. Go
16 back and look at your Bible. He calls sin sin. We are all
17 fallen. This isn't about saying that I'm better than you or
18 you're better than me. This is about aligning our right to
19 worship, to speak and to do according to our faith, and our
20 faith is pretty clear, and we're living in a day and an age
21 where there is an agenda, and there is reverse prosecution.

22 "And personally I may be speaking out of turn here, but for
23 my African-American brothers and sisters I personally feel that
24 you had no choice in the color of your skin. There is nothing
25 you can do to change that fact so we want to elevate a decision

1 to a protected civil class. And when we do that in this
2 nation, we are on dangerous ground.

3 "There's a lot of emotion left up here, brothers and
4 sisters. I would encourage you to look at this for what it is,
5 and that is to protect my right, your right, to hold what is
6 the most dear to you, to hold what I am willing to die for and
7 as I hope you and claim to be Christians are willing to die for
8 as well, and that is your beliefs. When you can no longer have
9 your -- have beliefs, are you no longer free."

10 That's the end of the statement.

11 Q And is that type of language familiar to you?

12 A Yes. Certainly in legislative debates over religious
13 exemption statutes we are seeing this kind of language that
14 expressly invokes Christian principles as a basis on which to
15 legislate in this matter.

16 Q Is it reminiscent of language used by any of the groups
17 that you study?

18 A Yes. So Christian right organizations, both in public
19 statements but as well in the communications with their
20 constituents, are expressly invoking Christian principles and
21 notions of sin as a basis on which to seek religious exemption,
22 specifically in this context.

23 Q Okay. Now, you mentioned in your study of these groups you
24 often review social media accounts. Is that correct?

25 A Yes.

1 Q Okay.

2 MR. KAYE: I should note for the record that the
3 exhibit that Professor NeJaime was just testifying about was
4 CSE-28, and I have just handed Professor NeJaime a document
5 that been marked as CSE Exhibit 10.

6 THE COURT: Hold on for one second. So that the
7 record will show that CSE-28 from which the professor was just
8 reading is labeled "February 19, 2016, House Debate." I assume
9 that's Mississippi legislature.

10 MR. KAYE: Yes, sir.

11 THE COURT: He was reading --

12 MR. KAYE: From page 33, the first page 33 of that
13 document.

14 THE COURT: From the House debate, page 33. The
15 exhibit -- the full exhibit contains statements from
16 March 30th, 2016, includes the senate debate. But he was
17 reading from the House debate just so that the record will be
18 clear as to that.

19 MR. KAYE: Thank you for that clarification, Your
20 Honor.

21 BY MR. KAYE:

22 Q Professor NeJaime, I've handed you a compilation of
23 statements made by legislators in social media. Have you
24 reviewed this document?

25 A Yes.

1 Q Okay. And are there any statements by legislators in this
2 compilation that stand out to you?

3 A So I'm just looking at the first statement which includes
4 some of the organizations that supported the Mississippi law.

5 Q Okay. Just for the record, this is -- it appears to be a
6 Facebook post from Andy Gibson. And it's the first page of the
7 exhibit. Do you recognize any of the organizations listed
8 here?

9 A Yes. So there's national organizations that I study here,
10 the Southern Baptist Convention Ethics and Religious Liberty
11 Commission, the American Family Association, the Alliance
12 Defending Freedom, the Family Research Council, and the
13 Heritage Foundation.

14 Q Okay. Are there any -- I'd like to -- are there any other
15 statements in this compilation that are relevant to you? I'll
16 direct you to the fifth page of the compilation.

17 A So this is from the same legislator. "Check it out @ERLC.
18 Mississippi has the best post *Obergefell* legislation to date.
19 ERLC is --"

20 Q This appears to be a retweet? Is that --

21 A Yes.

22 Q Is that the right terminology?

23 A Yes.

24 Q And do you recognize @ERLC?

25 A Yes. It's the Ethics and Religious Liberty Commission,

1 which was on the first page as one of the supporters from the
2 Southern Baptist Convention.

3 Q You can set that document aside. I'm now handing Professor
4 NeJaime a document premarked CSE-29. Professor NeJaime, do you
5 recognized this document?

6 A Yes.

7 Q What is it?

8 A It's a press release from Citizen Link about the passage of
9 the Mississippi law HB 1523.

10 Q What is Citizen Link?

11 A Citizen Link is a part of Focus on the Family, and it
12 coordinates the efforts of state advocacy groups to pass in
13 state legislatures bills that advanced the agenda of the
14 Christian right organizations, and it's recently changed its
15 name to the Family Policy Alliance.

16 Q What is Focus on the Family?

17 A Another Christian right organization.

18 Q Is there anything in this press release that stands out to
19 you?

20 A In the second paragraph the press release says that, "Our
21 friends and the Alliance Defending Freedom wrote model
22 legislation for the bill. Kelly Fiedorek, an attorney with ADF
23 said people know the value of religious freedom."

24 Q Does it surprise you?

25 A No. We expect based on looking at these organizations that

1 they would be working with the state legislators to introduce
2 and pass legislation that includes broad religious exemptions.
3 And so it would be expected that a group like ADF would be
4 producing model legislation, and we know, in fact, that they
5 have produced model legislation in other areas.

6 Q I'd like now to turn your attention to HB 1523 itself. I'm
7 going to hand you what's been marked as Defendant's Exhibit 1.

8 Professor NeJaime, what is the title of this bill?

9 A Protecting Freedom of Conscience from Government
10 Discrimination Act.

11 Q Does that verbiage seem familiar to you?

12 A Yes. In my research, we -- what we have observed is a
13 shift in language towards talking about conscience and
14 discrimination. So this is using discrimination as a way to
15 talk about religious exemptions such that you are protecting
16 from discrimination those who are seeking religious exemptions
17 from obligations that they might have to serve others without
18 regard to discrimination.

19 Q Okay. So people are being discriminated against because
20 they wanted to discriminate, if they are being told not to
21 discriminate. Is that right?

22 A They are arguing that those who seek exemptions from
23 antidiscrimination obligations are being discriminated against
24 based on their religious beliefs.

25 Q I'd like to direct your attention now to Section 2 of the

1 bill. Would you read that, please.

2 A "The sincerely held religious beliefs or moral convictions
3 protected by this act are the belief or conviction that (a)
4 marriage is or should be recognized as the union of one man and
5 one woman.

6 THE COURT: Slow down just a tad bit when you are
7 reading.

8 A "(b) sexual relations are properly reserved to such a
9 marriage. And (c) male (man) or female (woman) refer to an
10 individual's immutable biological sex as objectively determined
11 by anatomy and genetics at time of birth."

12 Q Do you have an understanding as to why those three
13 religious beliefs were grouped together?

14 A So these beliefs are consistent with the natural family
15 idea that I spoke about earlier so that marriage is the union
16 of a man and a woman, that only sex within marriage is
17 acceptable -- this is the sex for procreative purposes within a
18 marital unit -- and that men and women as a matter of
19 biological destiny, based on their biological sex, fill
20 different and complementary roles in society as well as in the
21 family.

22 Q Okay. So, Professor NeJaime, in your expert opinion, how
23 does HB 1523 compare to other bills of its type?

24 A So of laws that have passed, HB 1523 is both narrower and
25 broader. So of the other laws that we have studied, those laws

1 do not specifically name religious beliefs that are protected
2 but rather protect sincerely held religious beliefs of
3 claimants. And those laws that have passed have not protected
4 secular businesses from any obligations to serve explicitly in
5 the way that this law does.

6 Q This is really an outlier.

7 A Yes, it's unique.

8 MR. KAYE: No further questions at this time.

9 THE COURT: Mr. McDuff, I presume you have no
10 questions for this witness?

11 MR. McDUFF: I have no questions, Your Honor.

12 THE COURT: All right.

13 CROSS-EXAMINATION

14 BY MR. GOODWIN:

15 Q Professor, first thing you've got to do is help me.
16 Pronounce your last name for me.

17 A NeJaime.

18 Q NeJaime. I was waking up in the middle of the night
19 thinking about mispronouncing your last name.

20 A No one gets it right.

21 Q You've covered a lot of ground in your testimony and so we
22 may be bouncing around a little bit here. So forgive me. I've
23 got a lot of notes here, and so I'll do the best I can. You
24 talked a lot about the Christian right and their attempts to
25 influence policy and laws. Correct?

1 A Yes.

2 Q Are they the only group in America that attempts to do
3 that?

4 A No.

5 Q Including the LGBT community also attempts to influence
6 policy and laws. Correct?

7 A Correct.

8 Q And that is the democratic process that we have. Is that
9 right?

10 A Yes.

11 Q Is there a Christian left? You are referring to the
12 Christian right. Is there a Christian left?

13 A The common academic term for those organizations that I was
14 referring to are the Christian right, and there isn't any sort
15 of accepted academic description of a Christian left.

16 Q Are there organizations of people that could be classified
17 as Christian left that attempt to influence policy and laws?

18 A Not that I study.

19 Q Not that you study. But there could be; you are just not
20 aware of them.

21 A There could be.

22 Q You say you don't study them. Do you study -- when it
23 comes to Christian left or Christian right, do you exclusively
24 focus on the Christian right and their efforts to influence
25 policy and laws?

1 A I study primarily two movements: The LGBT movement and the
2 Christian right movement. And those two moments have been
3 involved in what we describe as movement/countermovement
4 conflicts, and so it makes sense from a research perspective to
5 study those two movements.

6 Q And you've been called by the plaintiffs in this case, and
7 you have said that you have never been tendered as an expert.
8 Is that right?

9 A I have never agreed to be an expert, yes.

10 Q And I've looked through your CV and looked at a list of
11 your articles, and it appears to me -- and correct me if I'm
12 wrong -- that your articles tend to skew in favor of the LGBT
13 community. Is that fair to say?

14 A I actually -- most of my articles don't take normative
15 positions. They are more analytical and interpretive. So in
16 my academic writing, I tend not to have a normative or
17 prescriptive position that's easily identifiable. But
18 certainly I've taken positions that some in the LGBT movement
19 might find aligned with some of their positions.

20 Q Have you ever found in any of your writings that a
21 religious accommodation law in your opinion was acceptable and
22 constitutional?

23 A Yes. So that's partly when I say it's not clear that I'm
24 always taking -- that I take a particular normative position,
25 in the context of religious accommodation, my own writing is

1 actually supportive of religious exemption, and we elaborate,
2 my coauthor and I, the conditions in which we deem to be
3 acceptable as a legal and principle matter, which is distinct
4 from other positions that -- including the Supreme Court's
5 decision in *Smith* that would oppose exemptions from generally
6 applicable laws.

7 Q So there's nothing per se unconstitutional about a
8 religious accommodation law.

9 A Religious accommodation laws can be constitutionally
10 permissible.

11 Q Thank you. You've testified that there's a long history of
12 religious accommodation laws dating back to, I believe, the
13 1960s. Is that right?

14 A The constitutional free exercise protections for exemptions
15 from generally applicable laws began with the court's
16 jurisprudence in the 1906s.

17 Q Are you aware of the laws that were enacted post *Roe v.*
18 *Wade* that provided for medical service exemptions or the right
19 for a medical provider or a person not to perform abortions?

20 A Yes.

21 Q And those laws have been on the books now since the 1970s.
22 Is that correct?

23 A So the federal church amendment passed in 1973, but there
24 were some state laws on the books before the church amendment.

25 Q And the church amendment in a nutshell -- and if you

1 disagree please tell me, but in a nutshell allows a person even
2 if they are receiving federal funds, public money, that they
3 can based on a religious belief, conviction, refuse to perform
4 abortions. Is that fair?

5 A Yes, it provides that a doctor or nurse can refuse to
6 perform an abortion and that those who perform abortions are
7 not to be discriminated against by institutions.

8 Q And I've read a couple of your things, including the
9 article that you wrote, "Conscience" for the *Yale Journal*.

10 A "Conscience Wars."

11 Q And in that I believe you said that this modern iteration
12 of religious accommodation laws are patterned after the church
13 amendment type laws that would allow someone to exempt
14 themselves from performing abortions based on religious
15 beliefs.

16 A So what we observe in "Conscience Wars" is different kinds
17 of exemptions being included in legislation after *Roe* and then
18 more recently in after the past couple of decades and the ways
19 in which some in the Christian right attempt to model some of
20 the protections. But there's variation among those what we
21 call healthcare refusal laws. So it would probably be
22 important to distinguish between the kinds of laws that exist.

23 Q You testified that in the wake of *Windsor* there was a --
24 there were lots of religious accommodation laws that were
25 introduced in state legislatures across the country. Correct?

1 A Yes.

2 Q I believe you said approximately 50 or so across the
3 country post *Windsor*. Correct?

4 A In the 2015 legislative session, yes.

5 Q That's what I'm referring to when I say "post *Windsor*."
6 And then post *Obergefell*, you had approximately 100 bills
7 introduced nationwide in state legislatures that addressed or
8 sought religious accommodations. Is that right?

9 A Yes.

10 Q And looking through my notes, in post *Windsor*, of the 50,
11 five were enacted. Do you know what states those were?

12 A This were Religious Freedom Restoration Acts enacted in
13 Indiana and Arkansas. There were laws allowing us --
14 magistrates or judges to refuse to perform marriages for
15 same-sex couples in North Carolina and Utah, and there was a
16 law in Michigan that allowed adoption and foster agencies to
17 refuse to provide services based on sincerely held religious
18 beliefs.

19 Q Many of the same things that are in HB 1523 that's at
20 issue today.

21 A The Religious Freedom Restoration Acts are distinct, and
22 Mississippi already has its own Religious Freedom Restoration
23 Act. The other provision -- the adoption provision in Michigan
24 provides not to specific religious beliefs but to any sincerely
25 held religious belief so it doesn't limit the beliefs that are

1 protected, and the same is true of the other laws that passed.

2 Q What about the two laws that were passed post *Obergefell*?

3 We are talking about Mississippi and this bill being one.

4 Correct?

5 A Yes.

6 Q The other, am I assuming that's the North Carolina --

7 A No, north Carolina recently passed bill isn't a religious

8 exemptions bill. The other religious exemptions law that

9 passed is in Florida, which is called the Pastor Protection

10 Act.

11 Q Called what? I'm sorry.

12 A Pastor Protection Act.

13 Q What does that law provide?

14 A It provides that clergy and religious organizations do not

15 need to perform or solemnize marriages for same-sex couples,

16 which in some ways reiterates constitutional protections that

17 already exist.

18 Q That's a provision that's also in HB 1523. Correct?

19 A HB 1523 is about religious organizations when they act as

20 employers and providing goods and services as well as housing,

21 which goes beyond -- the Florida bill has inclusion of

22 religious organizations, but there's different definitions of

23 what constitutes a religious organization and when the

24 religious organization is protected in certain actions.

25 Q I guess I asked a poorly worded question. Does HB 1523

1 allow pastors to refuse to perform same-sex marriages just like
2 the Florida bill?

3 A So HB 1523 includes exemptions for religious organizations
4 including solemnization, but that would already be provided as
5 a constitutional matter.

6 Q That's in there in 1523, just like the Florida bill.

7 A Should I review the bill in term of if the term "clergy" is
8 in here?

9 Q I'll represent to you that it's in there, but if -- have
10 you looked at the bill?

11 A Yes.

12 Q Okay.

13 A So it provides that the state government shall not take any
14 discriminatory action against a religious organization --

15 THE COURT: Tell the court what section you're reading
16 from.

17 A Section 3. "The state government shall not take any
18 discriminatory action against a religious organization wholly
19 or partially on the basis that such organization solemnizes or
20 declines to solemnize any marriage or provides or declines to
21 provide services, accommodations," and then it goes on, "based
22 on belief described in Section 2 of this act." So that would
23 provide this type of accommodation.

24 Q And let's see. In Section 9 of HB 1523 under -- you see
25 Section 9, and then turn the page to number 4, subset (4). It

1 says, "Religious Organizations."

2 A Right.

3 Q And then you see in (c) there it says, "Religious leader,
4 clergy or minister." Do you see that?

5 A Yes.

6 Q So we're in agreement that the two laws -- that HB 1523
7 provides the same protection, religious accommodation that the
8 Florida law does that you just spoke about, with regards to
9 allowing pastors to refuse to perform same-sex marriages.

10 Correct?

11 A Yes.

12 Q We went a really long way to get there, didn't we? My
13 apologies. You quoted from -- or you were handed CSE
14 Exhibit 28. This is the transcript of the House debate. Do
15 you still have this there with you?

16 A Yes.

17 Q And you read -- and for the record, this is well over 100
18 pages of House debate, is it not?

19 A Yes.

20 Q Okay. And you read a particular portion two or three
21 sentences, four sentences, from this earlier in your testimony,
22 did you not?

23 A Yes.

24 Q And I would like to bring to your attention -- and you were
25 reading from the House debate.

1 MR. GOODWIN: For the record, Your Honor, this will be
2 the -- I'm about to refer to page 37 of the senate debate that
3 is the -- it's all a part of this collective exhibit, but it's
4 the March 30, 2016, senate debate page 37. Are you there?

5 A Yeah.

6 Q Okay. Do you see at the top it says, "Senator Jennifer
7 Branning"?

8 A Yes.

9 Q Could you read that for me beginning there, and I'll stop
10 you when we -- when you have read what I would like for you to
11 read?

12 A "Senator Jennifer Branning: Yes, I do. That's what this
13 bill specifically addresses.

14 "Senator Joey Fillingane: So would you agree with me that
15 there's a difference between equal rights and equal protection
16 of the law versus special or elevated rights, which some groups
17 may be seeking?

18 "Senator Jennifer Branning: Absolutely.

19 "Senator Joey Fillingane: And would that lead to the
20 reverse discrimination that you're talking about here and that
21 you've been answering questions from all of us? I mean, do you
22 agree with me that it's our duty under the law to provide equal
23 rights but not special or elevated rights?

24 "Senator Jennifer Branning: That's correct. And that's
25 what you're Supreme Court has held on numerous occasions.

1 "Senator Joey Fillingane: And is it our intent with this
2 piece of legislation, which you've masterfully handled, by the
3 way, to level the playing field and make sure that while we
4 don't discriminate against anyone, we also don't reverse
5 discriminate against people at the same time?

6 "Senator Jennifer Branning: Exactly."

7 Q Thank you. That's -- now, it's clear from that
8 testimony -- and first of all, are you aware that Senator
9 Jennifer Branning was one of the coauthors of this bill?

10 A Yes.

11 Q It's clear from this testimony, isn't it, that one of the
12 cosponsors is saying that there's zero intent in this to
13 discriminate against anyone.

14 A Well, what she's saying is that her purpose is to protect
15 against discrimination.

16 Q You can agree with me or disagree, and I'll allow you to
17 explain. But if could you, just give me a yes or no answer and
18 then you can explain as much as you would like.

19 But based on this, this testimony by cosponsor Senator
20 Jennifer Branning, she is stating unequivocally that the intent
21 of this bill is not to discriminate but to level the playing
22 field. Is that right?

23 A Right.

24 Q Okay. And, again, I'm sorry to interrupt you. If you'd
25 like to explain anything further you can. Now, there was

1 discussion and testimony about the Alliance Defending Freedom,
2 is that right, otherwise referred to as the ADF? Is that --

3 A Correct.

4 Q -- fair? And there was -- you testified at length about
5 that organization and the roots of it and the purpose of that
6 organization. Right? Correct?

7 A Yes.

8 Q Did -- the ADF, the Alliance Defending Freedom, they didn't
9 pass this bill; the Mississippi legislature did. Correct?

10 A Correct.

11 Q Again bear with me. I apologize. Have you ever done any
12 research about the impact, potential injury, to -- as a result
13 of laws like *Windsor*, *Obergefell* and others, have you done any
14 research regarding the potential impact or injury those laws
15 might have on the religious rights of those who may object to,
16 say, same-sex marriage?

17 A I studied the conflict that we might -- I studied the
18 religious liberty claims that they assert, and they assert
19 injuries as part of that, but I don't -- if you're asking do I
20 study qualitatively or quantitatively the impact of same-sex
21 marriage recognition on religious objectors, the answer is no.

22 Q Again the focus of your research and your study is the
23 impact of those laws on the LGBT community. Is that fair to
24 say?

25 A One area of the research that much the Williams Institute

1 does involves the LGBT population impacted by religious
2 exemptions laws.

3 Q But the inverse is not your focus, the inverse being the
4 impact on those seeking religious accommodation is not the
5 focus of your research.

6 A That's correct.

7 MR. GOODWIN: Your Honor, the court's indulgence just
8 one moment to confer with cocounsel.

9 (Short Pause)

10 MR. GOODWIN: Your Honor, I tender the witness.

11 THE COURT: All right. Any redirect of this witness?

12 MR. KAYE: Just a few things, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. KAYE:

15 Q Mr. NeJaime, you were talking about the Florida bill that
16 was enacted recently. Is that broader or narrower than
17 HB 1523?

18 A Narrower.

19 Q Why?

20 A It is solely about religious organizations and is also
21 focused on celebration and solemnization of marriage, and it
22 also includes sincere religious beliefs.

23 Q When you say it includes religious beliefs, does it
24 specifically enumerate which ones?

25 A No.

1 Q Other laws passed since 2015, are those broader or narrower
2 than HB 1523?

3 A So in terms of --

4 Q Let me ask the question again. In terms of the specific
5 religious beliefs, do any of those laws passed in 2015 identify
6 specific religious beliefs?

7 A No.

8 Q And in terms of the breadth of the activities that are
9 covered, are they broader or narrower?

10 A Narrower. And there are other -- part of what I mentioned
11 are other RFRAs, which leave to a court to adjudicate whether
12 the claimant wins rather than providing a blanket exemption.

13 Q Okay. Now, do you recall the testimony you were just
14 reading with Mr. Goodwin on page -- it was on page 37 -- is
15 that right -- of the senate debate for March 30?

16 A Yes.

17 Q Can I direct your attention to page 20 of that same debate?
18 Just 16 pages earlier, 17 pages earlier.

19 A Yes.

20 THE COURT: This is the debate from which --

21 MR. KAYE: The same day as the senate debate that Mr.
22 Goodwin raised. So it's the March 30, I believe.

23 THE COURT: You may proceed.

24 BY MR. KAYE:

25 Q I'd like to direct your attention to page 19, starting at

1 line 20. Would you read that for the record, please.

2 A "Senator Willie Simmons: But again I go back to the law,
3 to the title. It says, Protecting Freedom of Conscience from
4 Government Discrimination. So we want to move the government
5 protection to prevent discrimination from the government to
6 allow, we, the individuals to discriminate. And to give you an
7 example, let's just say that I as a male owned a business. And
8 if I had decided that I want to be a male chauvinist and not
9 employ any person other than males, would that be a form of
10 discrimination?

11 "Senator Jennifer Branning: Possibly.

12 "Senator Willie Simmons: And does this bill not allow that
13 to occur?

14 "Senator Jennifer Branning: It would not in your private
15 business. In the context of employment, Senator, it speaks to
16 religious-based organizations. And I'll give you an example.
17 Since you're talking about in the employment contest, let's say
18 Mississippi College I understand is a Baptist college, I
19 believe, a religious-based organization. If Mississippi
20 College has married housing, okay -- no, let me back up. Let
21 me use this in an employment context. If Mississippi College,
22 being a religious-based college, teaches that marriage is
23 between one man and one woman, they possibly would not want to
24 employ homosexual people on their staff.

25 "Senator Willie Simmons: But isn't that a form of

1 discrimination?

2 "Senator Jennifer Branning: If this bill is passed, it
3 wouldn't be. That's what we're trying to do is protect people
4 that have sincerely held religious beliefs on this one issue."

5 Q And you can stop there. Is what Senator Branning is
6 discussing here, does that fit with your understanding of the
7 word "discrimination"?

8 A Yes.

9 Q Well, when she says it wouldn't be discrimination.

10 A Oh, no. She's recognizing that this would be
11 discrimination, and this bill is attempting to immunize those
12 who otherwise would discriminate from being held liable for
13 discrimination.

14 Q Okay. And flipping back to page 36 -- 37 when you were
15 speaking with Mr. Goodwin in the middle of the page, you read
16 from Senator Joe Fillingane, "And it is our intent with this
17 piece of legislation, which you've masterfully handled, by the
18 way, to level the playing field and make sure that while we
19 don't discriminate against anyone we also don't reverse
20 discriminate against people at the same time."

21 In your opinion, do you agree that HB 1523 levels the
22 playing field and doesn't discriminate against anyone?

23 A No.

24 Q Now, when you talked about the blanket exemption in
25 HB 1523, what did you mean by that?

1 A It provides an exemption just as a matter of the law,
2 meaning that one just needs to read the law and know that they
3 are entitled to an exemption rather than a RFRA which
4 Mississippi has that provides that one can seek an exemption by
5 going to court, and that gives the ability to the judge to
6 balance the burden on the religious claimant against the
7 government's interest in enforcement of the law.

8 Q Okay.

9 MR. KAYE: If I may have one moment, Your Honor.

10 (Short Pause)

11 MR. KAYE: No further questions.

12 THE COURT: I have one question, and then the parties
13 will be able to follow up based on the question that I've asked
14 if they need to.

15 EXAMINATION

16 BY THE COURT:

17 Q Professor NeJaime --

18 A Yes.

19 Q -- you testified earlier about model legislation from ADF
20 or other groups. Is there -- the model legislation, is that a
21 public record anywhere? Have you seen any model legislation
22 based on either these RFRA statutes or the new type of statutes
23 that have been enacted since *Obergefell*?

24 A Yes. So model legislation by ADF is in publicly available
25 records, specifically with regard to transgender individuals.

1 So ADF did submit model legislation to the Colorado state
2 legislature on the rights of transgender people to use public
3 facilities. The Religious Freedom Restoration Act language is
4 based on the federal Religious Freedom Restoration Act. But
5 when some states have sought to amend their statutes to provide
6 protection explicitly to businesses, that's been done in
7 conjunction with organizations. So, for instance, in Arizona,
8 an Arizona state-based organization working with ADF, which is
9 also Arizona based, was involved in that effort.

10 There's also been specific drafts of religious exemption
11 statutes earlier in the same-sex marriage context dating back
12 to 2009 that were drafted by a group of law professors and
13 endorsed by organizations like the National Organization for
14 Marriage. But that's sort of a first-generation kind of
15 statute in this context.

16 Q Okay. Yeah. And I guess what maybe I want to ask that
17 particular question is the Exhibit CSE-29 from Citizen Link, I
18 guess, or that says, "Our friends at Alliance Defending Freedom
19 wrote model legislation for the bill." Have you had an
20 opportunity to review the particular model legislation that
21 might be tied to that particular comment?

22 A So that model legislation is not available. When I read a
23 statement like this, it's not surprising to me that there would
24 be legislation that a group like ADF helped to craft. But ADF
25 specifically also says that they are not a lobbying

1 organization and don't get involved in legislative effort. So
2 there are documents in the public records, for instance, in the
3 Colorado legislature that show that they are advocating
4 legislation and putting forward draft legislation, but the
5 draft legislation referred to here, to my knowledge, is not
6 anything publicly available and that's nothing I've reviewed.

7 Q Okay. Thank you.

8 THE COURT: Any followup based on the questions that
9 I've asked?

10 MR. KAYE: Nothing from me, Your Honor.

11 THE COURT: Anything from the State?

12 MR. GOODWIN: No, Your Honor.

13 THE COURT: All right. Is this witness finally
14 excused?

15 MR. KAYE: We have no further questions, Your Honor.

16 THE COURT: Okay. All right. You can go back to LA
17 or stay in Mississippi. If you stay here, please spend some
18 money in Jackson. You're free to -- you're released, and you
19 may stay or you may leave.

20 At this time, ladies and gentlemen, it's appropriate,
21 based on the conversations that the court has had with the
22 parties, we're going to take a lunch break now and we will
23 resume court at 2:30. So court's in recess.

24 (Recess)

25 THE COURT: Is the plaintiff ready to call the next

1 witness?

2 MS. KAPLAN: We are, Your Honor, but I believe that
3 the State wanted to do a little housekeeping first.

4 THE COURT: Oh, okay. Thank you.

5 MR. BARNES: May it please the court?

6 THE COURT: Mr. Barnes?

7 MR. BARNES: Yes, sir, Your Honor. I was going to
8 suggest that we discussed earlier that to the extent that there
9 are exhibits that are -- that were premarked we have already
10 discussed and there are no objections to, we'd ask that -- so
11 we'd ask that Exhibit D-1 through D-4 be admitted.

12 THE COURT: Okay. And any of the plaintiffs
13 exhibits -- I don't have the numbers -- but anything we haven't
14 objected to.

15 MS. KAPLAN: I believe -- I apologize, Your Honor. As
16 I said before, I'm terrible with numbers. I believe the
17 unobjected to exhibits from plaintiffs are 10, 14 through 16
18 and 26 through 29. I hope I got that right. They are nodding
19 like I did.

20 Two more very small things. One, Your Honor, we work
21 fast. So during lunch we submitted to the court an evidentiary
22 brief on the constitutional facts doctrine. It should have
23 been filed, but I have an extra copy I can hand up if Your
24 Honor would like. And, two, this relates to the CSE I matter,
25 but I thought it was worth mentioning. Apparently just during

1 lunch today there was a news report from at least one source
2 that the clerk of DeSoto County intends to recuse from issuing
3 marriage licenses to gay couples.

4 With that, Your Honor, we are ready to call our first
5 witness, who is Jeremy Simons.

6 THE COURT: Hold on. Hold on. Hold on. I apologize.

7 MR. McDUFF: Your Honor, just to make it clear, I
8 believe our exhibits have already been moved into evidence and
9 admitted by the court subject to the exceptions previously
10 stated. But if they haven't, I now move them into evidence.
11 They would be 1 through 24 except the court --

12 THE COURT: Hold on for one second. Ms. Smith, did
13 you keep track of all of those that I said were admitted and
14 the objections and when I overruled -- I intended for them to
15 be admitted at that time.

16 THE CLERK: It was Exhibit 1 and a portion of
17 Exhibit 10 you said would not be --

18 THE COURT: Right, right. But everything else
19 basically was. Right? And they are already in evidence
20 according to what you have done.

21 THE CLERK: I have P-2, P-3, P-4, P-5, P-6, P-7, P-8,
22 P-9, P-10, P-11, P-12, P-13, P-14, P-5, P-16, P-17, P-18, P-19,
23 P-20, P-21, P-22, P-23, P-24.

24 MR. McDUFF: That's correct, Your Honor.

25 (Exhibit P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10,

1 P-11, P-12, P-13, P-14, P-5, P-16, P-17, P-18, P-19, P-20,
2 P-21, P-22, P-23, P-24 marked)

3 THE CLERK: The others were CSE-29, CSE-10, CSE-28,
4 CSE-27, and D-1.

5 MS. KAPLAN: I also had CSE-26 is in which is the
6 resumé and 14 through 16, which I don't think there were
7 objections to, CSE-14, 15 and 16.

8 THE CLERK: I need copies of those. I don't have
9 them.

10 MR. BARNES: I believe the court overruled our
11 objections on 14, 15 and 16.

12 THE COURT: Which ones do you need copies of
13 Ms. Smith?

14 THE CLERK: CSE-26, CSE-14 through 16. I have -- you
15 did overrule 14 through 16.

16 MS. KAPLAN: I only have -- I apologize. All I have
17 is the binder, but we'll undertake to get you copies really
18 quickly.

19 (Exhibit CSE-10, CSE-14 CSE-15, CSE-16, CSE-26, CSE-27,
20 CSE-28, and CSE-29)

21 THE COURT: We'll just make sure that the record is
22 complete before we close out the record so it doesn't have to
23 be right now.

24 MR. BARNES: And, Your Honor, just point of
25 clarification, I believe Ms. Smith just said D-1 has been

1 admitted, and I believe they used it at one of their witnesses.
2 I believe there are no objections to D-2, D-3 and D-4. We'd
3 like to move those.

4 THE COURT: They are admitted.

5 (Exhibit D-1, D-2, D-3 and D-4 marked)

6 MS. KAPLAN: One more minor housekeeping matter, Your
7 Honor. With respect to our next witness, Rabbi Simons, we
8 would -- he had asked to affirm. I assume that's not an issue.

9 THE COURT: Absolutely.

10 MR. TABER: Good afternoon. Jacob Taber for
11 plaintiffs CSE and Dr. Susan Hrostowski. At this time
12 plaintiffs call their second witness, Rabbi Jeremy Simons, who
13 is in the courtroom.

14 THE COURT: Okay.

15 (Witness Affirmed)

16 THE COURT: You heard the instructions, Rabbi -- tell
17 me your last name again.

18 THE WITNESS: Simons.

19 THE COURT: The instructions that I gave to the other
20 witness. I assume you were in the courtroom.

21 THE WITNESS: I was not in the courtroom.

22 THE COURT: I'm sorry. The microphone is there before
23 you. You do not have to speak directly into it. Please speak
24 loudly and clearly enough for the court reporter to hear you.
25 Speak at a pace at which she can keep up with you, and please

1 allow the attorneys to finish their questions before you begin
2 to answer so that the two of you won't be speaking at the same
3 time, and make sure that all your responses are verbal.

4 A Yes, Your Honor.

5 THE COURT: Thank you.

6 RABBI JEREMY SIMONS,

7 Having first affirmed to tell the truth testified as follows:

8 DIRECT EXAMINATION

9 BY MR. TABER:

10 Q Good afternoon.

11 A Good afternoon.

12 Q Can you please state your name for record.

13 A My name Jeremy Joseph Ryszard Simons.

14 Q Is it okay if I call you Rabbi Simons?

15 A Yes, it is.

16 Q Rabbi Simons, do you live here in Jackson?

17 A Yes, I do.

18 Q And what do you do for a living?

19 A I am a rabbi here in Jackson. My title director of
20 rabbinistic service at the Goldring/Woldenberg Institute of
21 Southern Jewish life.

22 Q How does one become a rabbi?

23 A In America, most people become a rabbi by going to a
24 seminary to rabbinical school. In my case, I went to Hebrew
25 Union College. It's one year in Israel in Jerusalem followed

1 by four years stateside. In my case I was on the Los Angeles
2 campus.

3 Q Is your rabbinical school affiliated with a particular
4 Jewish denomination?

5 A Yes, it is. It is the seminary of the reformed movement.

6 Q And at rabbinical school, what sorts of topics did you
7 study?

8 A We studied quite a few topics in rabbinical school over the
9 five years. Everything from basic Hebrew, which is how the
10 curriculum begins during that year in Israel, to rabbinic texts
11 and medieval texts, commentaries on our scriptures as well as
12 basic skills for how to lead services, lifecycle events, how to
13 spoke publicly in congregations or courtrooms perhaps and as
14 well as pastoral care, how to counsel people in times of
15 distress.

16 Q Did you have to opportunity to study anything about the
17 history of American Judaism?

18 A Yes, I did. I took several courses.

19 Q What about Jewish laws relating to sexuality?

20 A Yes. Those laws come up in the curriculum, I wouldn't say
21 necessarily frequently but are mentioned in various classes,
22 yes.

23 Q Rabbi Simons, what does the Hebrew Bible and specifically
24 the five books of Moses have to say about gay people?

25 A Honestly very little, that there are approximately three

1 references found in the first five books of the Bible, in
2 Genesis through Deuteronomy. Two can be found in Leviticus,
3 and they say essentially the same thing, that a man cannot lie
4 with another man the way one lies with a woman. To put those
5 verses in context, however, they appear during a whole of
6 forbidden sexual acts, many of which have to do with incest.

7 It is also -- it is worth noting that these laws were only
8 intended to apply to Israelites when they were in the land of
9 Israel. They were never intended, if you read that chapter, to
10 be applied universally.

11 Q You mentioned two references in Leviticus. Was there a
12 third reference in the Bible?

13 A Yes. In Genesis, there's the story of Sodom and Gomorrah,
14 and some people see that as being indicative of a condemnation
15 of male homosexuality.

16 Q How do you read it?

17 A I choose to read it based on the rabbinic interpretations
18 called the Midrash that are over a millennia old, and they
19 describe the chief sin of the residents of Sodom as being an
20 unjust and corrupt society, and they trace that injustice
21 actually to economic injustice. Nowhere in the rabbinic
22 commentary does it dwell on the sexuality of the people of the
23 town.

24 Q Is this something you learned at your reformed Jewish
25 rabbinical school?

1 A It came up within classes, but it's the sort of text that
2 any learned Jew can find when they study our commentary and our
3 tradition that it is common to study commentary alongside the
4 text itself.

5 Q How did you decide to become a rabbi?

6 A It's kind of a funny story. I originally thought I was
7 going to be a lawyer. I have never imagined I would be telling
8 this to -- in this situation here. But I was actually on my
9 way to law school after -- I had graduated from my
10 undergraduate university, and I was cleaning up my religious
11 school classroom where I had been treating part-time with an
12 old friend of mine who was my coteacher.

13 We were cleaning out the classroom at the end of the school
14 year and she said, *You know, Jeremy, it's a shame you're going*
15 *to law school because you would have been a really good teacher*
16 *and really good youth group advisor.* I said, *You know Cory,*
17 *you're right.*

18 Something clicked in that moment, and I started applying to
19 jobs in the Jewish world the very next day. I thought I'd just
20 spend a few years and then go on to law school, but that ended
21 up being four years that I worked as a teacher in a synagogue
22 and a youth group advisor and almost the equivalent of a youth
23 pastor. During that time, I realized this was really my
24 calling and what I wanted to devote my life to.

25 Q Were the synagogues that you worked at before rabbinical

1 school affiliated with any denomination of Judaism?

2 A Yes. They were both members of the Reform movement.

3 Q What is reformed Judaism?

4 A The Reform movement, it began in Germany and also pretty
5 soon after found its way to America in Cincinnati, and it's
6 predicated on the idea of allowing rationality to be a part of
7 the religious. So, for example, accepting the basis of science
8 and the scientific method.

9 And also the name "Reform" comes from very specific reforms
10 made by those first reformers. So it had to do with reforming
11 the liturgy, speaking in the vernacular, which would have been
12 either German or English here in America, rather than Hebrew
13 and a number of other essentially reforms. And one thing
14 that's important to point out that it's called Reform Judaism
15 as opposed to reformed, and that's because the movement is
16 constantly changing, and it is constantly evolving. Its
17 platform has been restated numerous times throughout the
18 movement's history.

19 Q Do you know about how many reformed synagogues there are in
20 this country?

21 A There are approximately 900 synagogues who are dues paying
22 members of the movement.

23 Q How did that compare to other denominations in American
24 Judaism?

25 A That is the largest. It is the largest denomination in

1 American Judaism.

2 Q And, now, there are other denominations, I assume from what
3 you just said. Can you tell us what those are?

4 A Yes. The Jewish world can be kind of complicated, but
5 there are three additional main movements and probably
6 countless smaller movements or groups. But the other three
7 main groups are the Reconstructionist movement, the
8 Conservative movement and what often is called the Orthodox
9 movement, however orthodoxy is really an umbrella term for a
10 number of movements that fall within that category.

11 Q And are you familiar with the beliefs and practices of
12 these other denominations?

13 A Yes, I am.

14 Q How so?

15 A First of all, just being a person active in the Jewish
16 world, you come into contact with Jews of all backgrounds on a
17 regular basis. But also while I was in seminary, I had the
18 opportunity to study and what are called transdenominational
19 settings or programs which means alongside seminary students
20 from other denominations which included academic study, travel
21 to Israel, and really around the world, and I have very close
22 connections in all the moments.

23 Q Now, in your job that you have now as a rabbi, what do you
24 do day to day?

25 A So it is somewhat a unique position. They tell me I'm the

1 only one in the country who does this sort of thing. I'm a
2 circuit-riding rabbi of sorts, which means that within the
3 southern region of 13 states, a survey that we conducted
4 several years ago identified approximately 100 synagogues
5 throughout these states that do not have a full-time rabbi of
6 their own. And that in turn led to the recognition that
7 there's a need for rabbinic support, hence the position was
8 created and my job is to serve this communities who are
9 otherwise not served.

10 So two to three weekends a month, I find myself on the
11 road. And I also do a number of activities to support these
12 communities from here in Jackson where I'm based, including
13 writing a weekly sermon called "A Taste of Torah," which is
14 e-mailed out to approximately 1200 subscribers, and it's read
15 by these synagogues -- by lay leaders in synagogues who again
16 don't have a rabbi. They may not feel comfortable teaching
17 about the portion of the week, and this is a resource for them.
18 I do tutoring and also work in the community in a variety of
19 settings.

20 Q I'm sorry if you already said this, but what is Torah?

21 A Torah is the term we use for the first five books of the
22 Hebrew Bible. That would be Genesis, Exodus, Leviticus,
23 Numbers and Deuteronomy.

24 Q Now, these communities in the South that do not have rabbis
25 that you serve, are any of those located here in Mississippi?

1 A Yes, quite a few are located in Mississippi.

2 Q And which ones have you had a chance to visit in your time
3 at the job?

4 A I have visited the communities in Tupelo, in Oxford,
5 Cleveland, Meridian, Vicksburg, Natchez, Hattiesburg, and
6 Biloxi-Gulfport as well as Jackson.

7 Q And on a typical weekend visit, what sorts of things do you
8 get to do?

9 A I try to do everything a full-time rabbi would do if they
10 were in the community. So typically it involves leading
11 services, worship services -- in the Jewish faith, that's on
12 Friday nights and Saturday morning -- as well as teaching both
13 adults and children. Oftentimes, I will pay house calls to
14 homebound residents or hospital calls and really provide
15 whatever services are requested by the community.

16 Q Has this given you an opportunity to get to know Jews in
17 Mississippi?

18 A Yes, very well, yes. In fact, I get to be hosted often in
19 people's home for home hospitality and spends hours sitting at
20 kitchen tables learning about people's lives and their
21 experiences here.

22 Q Wonderful. Can you give an example of a lifecycle event
23 you have officiated in Mississippi which you said was the other
24 half of the work that you do?

25 A Yes. I had the privilege officiating at what's called the

1 bar mitzvah, which is a coming-of-age ceremony in Vicksburg.
2 And normally the ceremony happens when a young person is
3 between the ages of 12 and 13. In this case, the gentleman was
4 76 years old, and he had never had one when he was of the
5 appropriate age and realized about a year before that this was
6 something he wanted, which normally wouldn't be a big deal but
7 it requires reading from the Torah scroll in Hebrew.

8 And the problem was that that gentleman had never learned a
9 single letter of Hebrew. So over the course of the year, both
10 my predecessor and me, we worked with him to teach him Hebrew
11 and teach him how to use FaceTime so we could actually teach
12 him how to learn Hebrew. And we were successful with one of
13 those goals.

14 Q Now, from your experience engaging in this work, would you
15 say that most Jews in Mississippi belong to the Reform
16 denomination or Conservative or some other denomination?

17 A Most belong for the Reform denomination.

18 Q I am now going to give the witness a copy of HB 1523.
19 These we just printed out and they are not marked D-1, but I
20 represent that it's the same. Would the court like an
21 additional copy?

22 THE COURT: No, no.

23 MR. TABER: Your Honor, may I approach?

24 THE COURT: You may.

25 MR. TABER: Thank you.

1 BY MR. TABER:

2 Q So Rabbi Simons, do you recognize this?

3 A Yes, I do.

4 Q And what is it?

5 A This is a copy of HB 1523.

6 Q Have you had a chance to read this before?

7 A Yes, I have.

8 Q And how did you first learn about HB 1523?

9 A I heard about this first when the bill was being discussed
10 and then later when it was signed by the governor, both in
11 local media and on social media from friends and colleagues
12 across the country and, in fact, across the world.

13 Q Do you see on the first page in Section 2 the statute
14 identified as a few religious beliefs and moral convictions?

15 A Yes, I see that.

16 Q Can you read for us Section 2(a)?

17 A "Marriage is or should be recognized as the union of one
18 man and one woman."

19 Q Now, Rabbi Simons, do you personally hold this religious
20 belief?

21 A No, I do not.

22 Q And does the Reform movement of Judaism teach this
23 religious belief?

24 A No, it does not.

25 Q How do you know that?

1 A I know that because there have been a number of resolutions
2 passed by the movement and its leadership and members
3 stretching back to the 1970s.

4 MR. TABER: Your Honor, I'm now going to give the
5 witness -- and I have discussed this with counsel -- four
6 exhibits at one time, and we'll go through them one by one just
7 to save the trip, if that's all right.

8 THE COURT: That's fine.

9 MR. TABER: I'm going to be giving the witness CSE-5,
10 6, 7, and 8 in one stack.

11 BY MR. TABER:

12 Q So starting with Plaintiff's Exhibit CSE-5, which will be
13 the first document in front of you, do you recognize this?

14 A Yes, I do.

15 Q What is it?

16 A This is a resolution titled "Human Rights of Homosexuals"
17 that was passed by the Reform movement in 1977.

18 Q And briefly in your own words what does this say?

19 A This resolution acknowledges, first of all, the existence
20 of homosexuality as a legitimate sexual identity and encourages
21 that people that identify as homosexual be invited to and made
22 welcome in Jewish spaces.

23 Q How does the Reform movement pass a resolution like this?

24 A There are a number of ways. The most common is either
25 through the commission on social action or through biennial

1 conventions. It really has to do also based on the calendar.
2 We have a convention every two years attended by leaders
3 throughout the movement.

4 Q And about how many people would vote on a resolution like
5 this?

6 A Depends on the year. I can't speak historically, but the
7 last year there were 5,000 representatives.

8 Q Thank you. If you would please return to the next exhibit,
9 Plaintiff's Exhibit CSE-6. Are you familiar with this
10 document?

11 A Yes, I am.

12 Q And what is it?

13 A This is a document. It's another resolution passed by the
14 Reform movement. It is titled, "Support for Inclusion of
15 Lesbian and Gay Jews." It was passed in 1987.

16 Q Again in your own words briefly what it does say?

17 A This builds on the previous resolution from 1977 and again
18 explicitly recommends that gays and lesbians be allowed to
19 participate fully in synagogue life and explicitly states that
20 they should be allowed to participate equally in worship and
21 leadership and in general life.

22 Q Thank you. If you'd turn now to the next exhibit marked
23 Plaintiff's Exhibit CSE-7, are you familiar with this exhibit?

24 A Yes, I am.

25 Q And what does the document -- what is it?

1 A This is again another resolution passed by the Reform
2 movement. It is titled "Civil Marriage for Gay and Lesbian
3 Jewish Couples," and it was passed in 1997.

4 Q Again briefly what does it say?

5 A This again references the previous two resolutions and
6 calls for a civil marriage to be an option for gays and
7 lesbians in this country and furthermore instructs the movement
8 to consider how religiously we could accommodate a religious
9 wedding for gays and lesbians.

10 Q Look at the top of the document. Was this enacted by the
11 committee or by the whole biennial convention?

12 A It says it is adopted by the general assembly.

13 Q That would be --

14 A I believe so, yes.

15 Q Okay. Thank you. If you would finally turn to the last
16 document there, Plaintiff's Exhibit CSE-8. Are you familiar
17 with this document?

18 A Yes, I am.

19 Q And what is it?

20 A This document is, "Titled Resolution on Same Gender
21 Officiation." It was adopted in March of 2000, and this is a
22 slightly different type of resolution. This was adopted by a
23 group called the CCAR, the central conference of American
24 Rabbis. That is the rabbinic union that Reform rabbis are a
25 part of, and I'm also a member of.

1 Q In your own words, what does this say? What does it do?

2 A This document is the culmination of several years of
3 committee research on the matter which ultimately says that
4 Reform Rabbis are permitted to officiate at same-sex marriage
5 ceremonies and suggests liturgy to be used that would be
6 appropriate in such a setting.

7 Q Thank you. Looking at these documents and from your own
8 experience, how you would describe the religious beliefs of the
9 Reform movement of Judaism regarding gay and lesbian marriage?

10 A I can see a clear evolution starting again in 1977 up until
11 essentially the present where more and more rights and calls
12 for equality were made until we reached the present, which is
13 full unconditional equality.

14 Q To the best of your understanding, does HB 1523 reflect
15 these religious beliefs about gay and lesbian marriage?

16 A No, it does not.

17 Q Now, let me ask you what are your personal religious
18 beliefs about marriage?

19 A My beliefs I think I can best describe as having to do with
20 the ceremony itself, that when a Jewish couple is married or a
21 couple is married in a Jewish ceremony, it takes place under
22 what's called the *chuppah*, which is a wedding canopy, and the
23 *chuppah* or this canopy is meant to symbolize a number of
24 things. First it's the couple's home, but it also has to be
25 open on all four sides. Part of that is practical so people

1 can see that the couple is really there, but the deeper
2 meaning, at least for me, is that it says that this marriage is
3 public for the community and all the same, the entire community
4 is invited to be a part of this marriage but also a part of the
5 institution of marriage and that anyone ought to be able to see
6 themselves underneath that canopy and have the right to be
7 underneath there.

8 Q Do you believe that gay couples should be under that
9 canopy?

10 A Absolutely.

11 Q And just to be clear, do you see your personal religious
12 beliefs about marriage reflected anywhere in HB 1523?

13 A No, I do not.

14 Q Thank you. If you could turn back to the statute, which
15 was the first document I put before you. Could you please read
16 Section 2(b.)?

17 A Yes. "Sexual relations are properly reserved to such a
18 marriage."

19 Q Do you personally hold this religious belief?

20 A No, I do not.

21 Q And does the Reform movement of Judaism teach this
22 religious belief?

23 A No, it does not.

24 Q Rabbi Simons, in connection with your job, do you ever
25 provide premarital counseling to Jewish couples?

1 A Yes, that's a requirement for any wedding where a
2 officiate. I meet with the couple for four to five sessions at
3 least beforehand to discuss their upcoming marriage.

4 Q Do the couples that you counsel ever talk about having been
5 in a sexual relationship prior to marriage?

6 A They don't always want to volunteer that to a rabbi;
7 however, as part of the process, I have them fill out several
8 diagnostic relationship tools. And it includes a section on
9 sexual relations and has the assumption that said relations
10 have occurred.

11 Q Have you ever refused to marry a couple because you learned
12 that they had had sex before marriage?

13 A No, certainly not.

14 Q And just looking at the statute again, do you see your
15 religious beliefs about sex before marriage reflected in HB
16 1523?

17 A No, I do not.

18 Q Thank you. Looking at the statute -- and you're going have
19 to flip the page. This is single-sided, I think. Could you
20 please read Section 2(c).

21 A "Male (men) or female (woman) refer to an individual's
22 immutable biological sex as objectively determined by anatomy
23 and genetics at the time of birth."

24 Q Rabbi Simons, do you personally hold this religious belief?

25 A No, I do not.

1 Q And does the Reform movement of Judaism teach this
2 religious beliefs?

3 A No, it does not.

4 Q Rabbi Simons, what are your religious beliefs about gender
5 and gender identity?

6 A I think that they can be summed up by the beginning of the
7 Torah, Genesis chapter one, where in the creation story we read
8 that humanity was created in *b'tzelem elohim*, in the image of
9 God. And, in fact, in that first chapter of Genesis, the story
10 is that man and woman were created simultaneously, and there
11 are even some teachings that they were created as one, a person
12 with both genders then separated.

13 And for me, the divine holiness of every human being is
14 central, far more so than any determining factor about their
15 body, whether it be their anatomy or so much as their hair
16 color or eye color.

17 Q Just to be clear, does traditional Judaism believe that
18 every single person is born definitely male or definitely
19 female?

20 A No. And we can actually go back to document called the
21 Mishna, which we know to be at least 1800 --

22 THE COURT: Could you spell that, please, for the
23 record.

24 THE WITNESS: Men-shen -- no.

25 THE COURT: I'm a Baptist.

1 MS. KAPLAN: Your Honor, would you like that in Hebrew
2 or in English?

3 BY MR. TABER:

4 Q All right, sir. Go, English.

5 A M-I-S-H-N-A.

6 THE COURT: Thank you.

7 A The H at the end is optional. This document called the
8 Mishna is at least 1800 years old, and it is rabbinic document,
9 and it discusses actually four distinct genders that are
10 possible, male, female, then a category called tumtum, which is
11 someone whose gender is essentially ambiguous, unable to be
12 ascertained and then androgenous, someone who displays both sex
13 characteristics.

14 And these documents -- the reason that rabbis care about
15 this is this was a gendered world where there were certain
16 things that you did for boys, certain things you do for girls.
17 Specifically for boys, if you're Jewish, you circumcise them,
18 and that's very important. And in order to do that, you have
19 to decide if you have a boy or not; hence, why the rabbis are
20 concerned with this issue. And you can see in the writings
21 they truly struggle with it, in what to do in these cases where
22 it is ambiguous. But what you don't see is them condemning the
23 child or saying that this child cannot be a part of the
24 community or is any less human or holy than anyone else.

25 Q Thank you.

1 MR. TABER: Your Honor, may I approach the witness?

2 THE COURT: Yes, you may.

3 MR. TABER: I'm now going to give the witness

4 Plaintiff's Exhibit CSE-9.

5 BY MR. TABER:

6 Q Rabbi Simons, you have seen this document before?

7 A Yes, I have.

8 Q What is it?

9 A This is another resolution passed by the Reform movement.

10 It is titled "Resolution on the Rights of Transgender and
11 Gender Nonconforming People," and it was adopted at the most
12 recent biennial convention which was this last fall in Orlando,
13 and I happened to be in the room when this resolution was
14 adopted.

15 Q What was that like?

16 A It was a rather incredible experience. This was -- we
17 talked earlier a meeting of the leadership of the movement.
18 There were 5,000 representatives in the hall at the time, which
19 represented 900 congregations, 1.5 million Reform Jews. The
20 resolution was presented, and then the chairman called for a
21 voice vote. And there is an old joke that if you have two Jews
22 in a room, you're destined to end up with three opinions
23 someone once corrected me and said, *No, Rabbi, it is four*
24 *opinions*, which only proves the joke.

25 But this was the first time I think I have ever seen and

1 probably ever will see that you had 5,000 Jews in a room and
2 you had one opinion. It was a unanimous decision followed by a
3 standing ovation.

4 Q In your own words, briefly, what does the resolution say?

5 A The resolutions recognizes the existence of transgender and
6 gender nonconforming people and says that they should be
7 treated equally, both civilly and in religious settings, and
8 furthermore encourages our member congregations and
9 institutions which includes summer camps, college programs,
10 Israel programs, for all organizations that fall underneath the
11 Reform movement to provide accommodations and sensitivity to
12 people of all backgrounds.

13 Q To the best your understanding, is the resolution rooted in
14 a political or religious beliefs?

15 A This is absolutely a religious belief and it cites several
16 religious sources in the document.

17 Q And to the best of your understanding, does HB 1523
18 reflect this -- the beliefs articulated here regarding
19 transgender people?

20 A No, it is diametrically opposed to it.

21 Q So looking at Section 2 as a whole, then -- first let me
22 ask you, can you tell me that every single Reform Jew or person
23 who calls himself a Reform Jew believes what you believe about
24 the topics we've discussed today?

25 A I cannot even begin to pretend I could speak for all Jews.

1 Q But would you say that the Reform -- can you tell me does
2 the Reform movement of Judaism hold any of the religious
3 beliefs in HB 1523?

4 A No. As an organization, no, and I would say most Jews do
5 not, including the organization I work for, which is the
6 largest Jewish organization in the state, the Institute of
7 Southern Jewish Life. And when this resolution was adopted, we
8 issued a press release condemning it, approved by our board as
9 well as our staff. And we are not an organization that delves
10 into politics or matters of politics rarely if ever. So for us
11 to issue a condemnation is a pretty significant event.

12 Q Turning to the other Jewish denominations, to the best of
13 your understanding with the familiarity we have discussed, does
14 the Reconstructionist movement of Judaism hold the religious
15 beliefs identified in HB 1523?

16 A No, it does the not.

17 Q And does the Conservative movement of Judaism hold any of
18 the religious beliefs articulated in HB 1523?

19 A No, it does not.

20 Q Do orthodox Jews hold some or all of these beliefs?

21 A This it complicated with orthodoxy because that is a
22 blanket term for a number of groups. Within the Orthodox
23 movement, you can get different answers to these questions.
24 However, I can say there are a number of Orthodox organizations
25 dedicated to expanding gay rights and a place for gay and

1 lesbians and transgendered individuals within the Orthodox
2 community.

3 Q To the best of your understanding, does HB 1523 reflect the
4 religious beliefs of most Jews in Mississippi?

5 A No, it does not.

6 Q Rabbi Simons, do you hold any other sincerely held
7 religious beliefs that might be relevant to your testimony
8 today that we haven't yet had a chance to talk about?

9 A Yes. I hold a number of sincerely held religious beliefs
10 as a rabbi. And I think -- the one that's stuck in my mind
11 right now, we talked Leviticus and the prohibition against male
12 homosexual acts that are found in Chapters 18 and Chapters 20.

13 If you look in between those two chapters, Chapter 19, you
14 find the commandment *veahavta l'reyacha kamocho*, "You shall
15 love your neighbor, your fellow as yourself." And this idea of
16 loving and respecting those around us is central to my Judaism
17 and to most people's Judaism.

18 There's a famous story about Rabbi Hillel, who lived 2,000
19 years ago in the time of the Temple in Jerusalem. And when
20 asked to summarize the entire Torah in one sentence, he said,
21 "What is hateful to you, you do not do to another person."

22 Q Do you see this religious belief anywhere in HB 1523?

23 A I cannot find it anywhere on these 13 pages.

24 Q How does that make you feel?

25 A On the one hand, it makes me feel very upset that my

1 religion is seen as somehow less legitimate because I cannot
2 identify with the so-called sincerely held religious beliefs.
3 On the other hand, it makes me very angry because I consider
4 myself a religious person with deeply held religious beliefs.

5 And by God, if someone were to hear me say this and assume
6 that I believe anything that is in this statute, that is a
7 tragedy that I have to explain that this is not me and this is
8 not my religion.

9 Q Thank you so much.

10 MR. TABER: No further questions at this time, Your
11 Honor.

12 THE COURT: I presume Mr. McDuff has no questions.

13 MR. McDUFF: I have no questions, Your Honor.

14 THE COURT: Thank you.

15 MR. GOODWIN: Thank you, Your Honor. May I proceed?

16 THE COURT: You may, Mr. Goodwin.

17 CROSS-EXAMINATION

18 BY MR. GOODWIN:

19 Q Rabbi Simons, you identified that or you testified that you
20 are a member of the Reform movement. Correct?

21 A Yes, sir.

22 Q And that there are three other sects or denominations in
23 the Jewish faith: Reconstructionists, Conservative and
24 Orthodox. Correct?

25 A Yes, sir.

1 Q And that -- you said that while you can speak to the Reform
2 movement's official stance on certain things, that you can't
3 say that everyone in the Reform movement believes the same
4 things. Correct?

5 A That is correct.

6 Q I don't know that you can get anyone in any group to agree
7 on everything. Correct?

8 A Correct.

9 Q And you said as to the Reconstructionist, that as far as
10 you know, they do not -- they do not agree with the beliefs
11 identified in HB 1523. Is that right?

12 A That is correct.

13 Q But again you can't say that for every Reconstructionist,
14 no more be you can say that for every Reform movement member.
15 Correct?

16 A Correct.

17 Q And you said that for the Conservative movement the same
18 thing. Correct?

19 A Correct.

20 Q And just like with the Reform movement, you say that -- you
21 could not make a blanket statement about every member of the
22 conservative movement, could you?

23 A I could not.

24 Q As to the Orthodox denomination, you said that that was
25 much trickier because it -- there were a lot of divergent

1 opinions within that denomination. Right?

2 A Correct.

3 Q And certainly based on all of that, there are members of
4 the Orthodox Jewish faith that disagree with same-sex marriage.

5 Would you agree?

6 A I would, yes.

7 Q And there are members of the conservative faiths or
8 movement that disagree with the same-sex marriage. Correct?

9 A Correct.

10 Q And the same for the reconstructionist. Correct?

11 A Correct.

12 Q And the same even for the Reform movement. Correct?

13 A Correct.

14 Q And as to the belief or conviction that sex should be had
15 between a man and woman who are married or within the confines
16 of marriage, there are people in the Reform movement that hold
17 that belief. Correct?

18 A Correct.

19 Q And the same goes for the Reconstructionist. There are
20 members of that movement that hold that belief. Right?

21 A Uh-huh.

22 Q And the Conservative movement: Same thing. Right?

23 A Uh-huh.

24 Q And the Orthodox movement. Correct?

25 A Correct.

1 Q And then as to the last, which says that -- this is part
2 (c) of Section 2, that male or female refer to an individual's
3 immutable biological sex as objectively determined by anatomy
4 and genetics at time of birth. There are Reform movement
5 members who would agree with that. Correct?

6 A Possibly, yes.

7 Q And Reconstructionist members that would agree with that.
8 Correct?

9 A Possibly, yes.

10 Q And Conservative members that would agree with that.
11 Correct?

12 A Possible, yes.

13 Q And Orthodox members who would agree with that. Correct?

14 A It's possible, yes.

15 Q And these three beliefs that are identified -- beliefs or
16 convictions that are identified in 1523, they also -- you can
17 find those beliefs and other religions. Correct?

18 A I can't speak about other faith.

19 Q Is you can't speak as to whether or not they exist in any
20 Christian denomination?

21 A I don't consider myself an expert on other religious
22 faiths.

23 Q The same would apply to whether or not Islam -- if people
24 of the Muslim faith had those beliefs, you couldn't speak to
25 that?

1 A I'm a rabbi.

2 Q I know that sometimes rabbis and other people study other
3 religions as well. I just had to ask the question.

4 A I have extensively, but I believe in letting other people
5 speak for themselves.

6 Q Okay. Fair enough. The documents -- and I'm going to be
7 referring to Plaintiff's Exhibit CSE-8. Do you have that
8 document, Rabbi?

9 A I do.

10 Q And this was a resolution that was passed by an
11 organization that you're a member of. Is that right?

12 A Yes, it is.

13 Q And that's the Central Conference of American Rabbis?

14 A Yes.

15 Q Is that a Reform movement group only or is it a mixture of
16 Reform and other denominations?

17 A It is a Reform member group.

18 Q Okay. And I would like to point to on the second page
19 the -- where it says the first -- the first paragraph on the
20 second page that says, "Further resolved." Could you read that
21 paragraph and the next paragraph for us, Rabbi.

22 A Yes. "Further resolved that we recognize the diversity of
23 the opinion within our ranks on this issue. We support the
24 decision of those who choose to officiate at rituals of union
25 for same gender couples, and we support the decision of those

1 who do not. And further resolved that we call upon the CCAR,
2 Central Conference of American Rabbis, to support all
3 colleagues in their choices in this matter."

4 MR. GOODWIN: One moment, Your Honor, to consult with
5 cocounsel.

6 THE COURT: Okay.

7 (Short Pause)

8 MR. GOODWIN: I tender the witness, Your Honor.

9 THE COURT: Thank you, Mr. Goodwin. Any redirect?

10 MR. TABER: We have nothing further, Your Honor.

11 Thank you.

12 THE COURT: All right. Rabbi Simons, you may step
13 down. Thank you so much for your testimony. You may call your
14 next witness.

15 MR. DIETER: Thank you, Your Honor. At this time the
16 plaintiffs would like to call Reverend Susan Hrostowski to the
17 stand, please.

18 (Witness Sworn)

19 THE COURT: Reverend, you've been in the courtroom the
20 whole time. Right?

21 THE WITNESS: Yes, sir.

22 THE COURT: You've heard the instructions that I've
23 given?

24 THE WITNESS: Yes, sir.

25 THE COURT: You'll abide by them?

1 THE WITNESS: Yes, sir.

2 REVEREND SUSAN HROSTOWSKI,

3 Having first been duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. DIETER:

6 Q Could you please state your name for the record.

7 A Susan Hrostowski.

8 Q Ms. Hrostowski, have you ever testified in court before?

9 A I have.

10 Q When was that?

11 A Last November I was in this very building testifying in a
12 suit in which we were trying to get the right to adopt. I was
13 trying to get the right to adopt my son.

14 Q So why is it that you need to testify in that lawsuit?

15 A Well, I'll tell you the whole long story. My wife and I
16 have been together for 27 years, and when we had been together
17 for about four years we decided we'd like to have a child, and
18 we decided that my wife would bear the child by artificial
19 insemination and once he was born I would do a second-parent
20 adoption.

21 When my wife Kathy was about eight months pregnant, a bill
22 came up in the legislature that said no two people of the same
23 gender could adopt a child and that precluded second-parent
24 adoptions, and that was signed into law when my son was six
25 weeks old.

1 Q What did that feel like to be unable to adopt your son?

2 A It was devastating. It was devastating. We had planned
3 this -- it was such a joyful moment to welcome him into the
4 world, and then this law barred us from being affirmed and
5 validated as a family. It barred us from certain financial
6 securities and legal securities. It made us a little paranoid,
7 to tell you the truth. So I was worried that people were going
8 to come and take them away from us because we were two people
9 of the same gender with a baby in our house.

10 Q What was the outcome of that lawsuit?

11 A Well, we won, and then I was able to adopt my son just this
12 past April. He's now 16.

13 Q Congratulations.

14 A Thank you.

15 Q What did that feel like?

16 A I was so overjoyed. It was -- it was like the second best
17 day after his birth. It was just -- again, it was that
18 affirmation that we are a family and that our state recognizes
19 that and that we have all the privileges and responsibilities
20 associated with that. So it was wonderful. And, again, it
21 gave us that sense of security that's just indescribable.

22 Q Did you celebrate at all?

23 A We did. And my in-laws, my wife's family, sent me a
24 bouquet of flowers with a note that said, "Congratulations,
25 it's a boy." He's six foot one and weighs 185 pounds.

1 Q So tell me how long did that -- those feelings you
2 experienced and how long did that last?

3 A Unfortunately not very long. It was -- we were riding high
4 on that waive of, you know, we are making progress here. We
5 have lived to see our marriage be legalized and validated,
6 which we didn't think we would ever live to see. And then I
7 got to adopt my son, which I was worried I wouldn't live to
8 see. And then 1523.

9 So you know you kind of have this feeling like -- I'm a dog
10 lover. You have this feeling like you're a dog on a long
11 leash, and you're running and running and you think you're
12 free, and then you get jerked back by the neck, you know. So
13 it was very devastating.

14 Q Let's back up for a minute and make sure we get some of the
15 key background facts on record. Could you just tell us,
16 please, where do you live?

17 A I live in Hattiesburg.

18 Q Do you live with anybody?

19 A I live with my wife, Kathy, and my son Hudson.

20 Q Where were you born, Reverend?

21 A I was born in Savannah, Georgia. My father was in the Air
22 Force and so we moved around a bit. But I was born towards the
23 end of his career. So we moved to Mississippi when he was
24 stationed at Keesler from where he retired, and so that -- I
25 was almost seven when we moved to Gulfport.

1 Q Then how long did you live in Gulfport?

2 A All through school, all through undergraduate school, and
3 then I worked for Mississippi Power Company for five years when
4 I decided to go to seminary. So all through -- from seven
5 until I was in the mid 20s.

6 Q Okay. And you mentioned you went to undergraduate. Where
7 was that at?

8 A University of Southern Mississippi.

9 Q And then I know you also mentioned seminary. Did you get
10 any degrees beyond college?

11 A I got a master's of divinity at Virginia Logical Seminary,
12 and then I worked in the parishes for a while, and then I
13 started doing mental health and alcohol and drug
14 rehabilitation, which led me to go get a master's of social
15 work at University of Southern Mississippi. And then I got
16 interested in academia and so I went and got a Ph.D. in social
17 work from Tulane University in New Orleans.

18 Q Woman of many interests and degrees, it sounds like. So
19 that first degree you mentioned, the master's of divinity,
20 could you just tell us what topics do you study to earn that
21 did degree?

22 A Scripture classes, Old Testament and New Testament
23 scripture classes, ethics, systematic theology, pastoral care,
24 and homiletics.

25 Q Homiletics: What is that?

1 A The art of preaching.

2 Q And what is it that led you to enroll in that program?

3 A Well, right after my undergraduate program, I began working
4 for Mississippi Power Company. And as a very young person, I
5 had a position of some responsibility so I was in my very early
6 20s running the payroll department for a major utility company
7 and make something pretty nice money. So I had this really
8 nice condo on the beach, I had a car and a sailboat, and yet my
9 life felt really empty.

10 And I just -- I wanted to do something that had more
11 meaning and depth and was in service to humanity. So I love
12 church, and so I was at church every time the doors opened and
13 started a conversation with my priest, who was my mentor, and
14 then finally came to the realization that I had a call to the
15 ordained ministry.

16 Q So what is it that you do now?

17 A Well, two things. I'm an social professor of social work
18 at the University of Southern Mississippi, and I'm the vicar of
19 a church in Collins, Mississippi, St. Elizabeth's.

20 Q When whether you say "a vicar," what does that mean?

21 A A vicar is the priest in charge of a small congregation.

22 Q Okay. So what would your duties be like as a vicar of this
23 congregation?

24 A On Sundays I lead worship. I celebrate the Holy Eucharist,
25 which is the principal service on a Sunday. And, of course

1 perform other sacraments as they are needed. I teach Christian
2 education. I do pastoral care so I counsel with people when
3 they are in crisis. I visit people when they are sick or
4 having surgery or when a loved one has died, those kinds of
5 things.

6 Q Do you ever perform wedding ceremonies?

7 A I do.

8 Q If you could just briefly walk us through, what is the
9 process you go through if a couple were to come to you and ask
10 you to do their wedding?

11 A When a couple comes to me and asks me if I'll officiate at
12 their wedding, the first thing I think about is: Is there a
13 relationship? Do I have a relationship with them? And why are
14 they asking me to do this? And, you know, there's people who
15 will -- who are unchurched and they just decide they want to
16 get married, and they say, *Who do you know that can marry us?*
17 *And so, A friend of a friend of a friend gave me your number*
18 *and said you might marry us.*

19 No. No. You can go to the justice of the peace if that's
20 not important to you that you have a relationship of some kind.
21 You know, if there's not some kind of either relationship
22 with -- not necessarily my church but some church. Why do you
23 want a church wedding or why do you want to be married by a
24 clergy person if that's -- so it is all about relationship.

25 Then the other thing is that I require everyone whose

1 marriage I perform to have premarital counseling. So I'll
2 either do that myself or if I've known them for a long time and
3 I don't think it can be objective, then I'll refer them out to
4 a mental health therapist or another clergy person to do their
5 premarital counseling. So when there's some kind of issue that
6 you just know that this is going to cause a problem later down
7 the line, abuse, for example, then we say, *No, I'm not going do*
8 *that.*

9 Q Have you ever had a gay or a lesbian couple come to you and
10 ask you to do their wedding ceremony?

11 A Sure, yes.

12 Q Tell us what process would you go through if that would
13 happen?

14 A The exact same process. It is not any different.

15 Q And why is that? Why would you use the same process for a
16 gay or lesbian couple as a straight one?

17 A There's no difference. You have two people who want to be
18 joined in holy matrimony and so there's no reason for them to
19 be treated any differently.

20 Q Is there any theological basis for your decision in that
21 matter?

22 A I guess everything is based in the great commandment
23 that -- "Love one another as I have loved you," is what Jesus
24 said. Right? So pretty much it is based on that. And the
25 dignity and worth of every human being. In the Episcopal

1 Church, our baptismal vows include, Will you uphold the dignity
2 and worth of every human being? Will you seek and serve Christ
3 in all persons? And so you know that's the basis that we treat
4 everyone with dignity and respect.

5 Q So does the Episcopal Church have a position as to the
6 marriages of gay or lesbian couples?

7 A It does. After years of committee work -- and that's the
8 old joke about the Episcopal Church. On the seventh day, God
9 created a committee. So after years of study -- in the
10 Episcopal Church, we say that faith is a three-legging stool:
11 Scripture, tradition, and reason. And all three of those are
12 held in equal esteem, have equal weight. So after years of
13 considering the question, when meeting in general convention,
14 it is our tri-annual convention of representatives of the
15 Episcopal Church, both lay and ordained, we voted to open holy
16 matrimony to all people.

17 MR. DIETER: Your Honor, may I approach the witness?

18 THE COURT: Yes, you may.

19 BY MR. DIETER:

20 Q Reverend, I've handed you a document that's labeled
21 Plaintiff's Exhibit CSE-2, if you would take a look. Do you
22 know what this document is?

23 A I do. This is a letter from my bishop, Bryan Seage, to all
24 the clergy in the diocese of Mississippi.

25 Q Did you receive this letter?

1 A Yes.

2 Q What is your understanding as to the purpose of this
3 letter?

4 A Bishop Seage, who is a relatively new bishop -- he's just
5 been our bishop for a couple of years -- is changing a policy.
6 Under our previous bishop, Duncan Gray, when a same-sex couple
7 wanted to be married in the church, the priest had to have his
8 congregation or her congregation go through a long study
9 process, and the vestry had to vote and then still the priest
10 had to call the bishop and get permission to perform that
11 service. And so with our new bishop, Bryan Seage, he is
12 changing that to say to all the clergy, *If you want to perform*
13 *gay marriages, perform them. If you don't, don't.*

14 Q When you say "bishop," just to clarify, could you explain
15 what a bishop is?

16 A The bishop is what -- we call him the defender of the
17 faith. Right? So the bishop is the leader of a diocese, and a
18 diocese is a number of Episcopal congregations usually in a
19 geographic area. In the state of Mississippi, all of
20 Mississippi is one diocese.

21 Q To the extent that you have an understanding, how is that
22 the Episcopal Church as a whole came to arrive at its position
23 on gay and lesbian couples and their marriages?

24 A Well, again, you know, because we look at scripture,
25 tradition and reason, and because we understand that cultures

1 change and life changes and because -- we know that we are
2 imperfect people and we see things more clearly the more
3 information we take in. So over those years when committees
4 were studying the question of gay marriage, it just became more
5 and more clear this was the right thing to do. So it was voted
6 on the both the laity and clergy and was passed.

7 MR. DIETER: Your Honor, may I approach once more?

8 THE COURT: Yes, you may.

9 BY MR. DIETER:

10 Q The document I just handed the witness is Defendant's
11 Exhibit 1. I believe both counsel and the court has a copy of
12 it. Reverend, are you familiar with this document?

13 A I am.

14 Q And can you please tell us what that document is.

15 A This is HB 1523.

16 Q Could you read allowed for the court, please, just section
17 2(a) near the bottom of the page.

18 A "Marriage is or should be recognized as the union of one
19 man and one woman."

20 Q And we've touched on this some, but how is it that this
21 belief that you just read compares to your own religious
22 beliefs?

23 A It is incomplete, because it does not include gay and
24 lesbian couples.

25 Q And how does it compare with the Episcopal Church's

1 beliefs?

2 A Again it would be incomplete because now holy matrimony is
3 available to again both straight and gay couples.

4 Q Looking a little bit further down in that exhibit to line
5 2(b), could you please read that allowed for the court?

6 A Sexual relations are properly reserved to such a marriage.

7 Q So what are your own religious views on this subject?

8 A First of all, sexual relations are only reserved to such a
9 marriage which would be between one man and one woman,
10 according to this document, which, as I said, is incomplete.

11 And, secondly, I would say that, you know, ideally, ideally
12 we like to see people -- here's the thing. Sex is a gift from
13 God, and it is precious and wonderful and should be treated as
14 such. So when you have a gift that's precious and wonderful,
15 you care for it. You take care of it.

16 And so ideally sexual relations should be within the bonds
17 of a caring and committed relationship. That's the ideal. But
18 we all know that we are human. And so, you know, you cannot
19 really hold fast to that as, you know, this is just the way it
20 is all the time.

21 Q So if, for example, you had a couple come into your
22 congregation seeking to participate in communion and you knew
23 that couple wasn't married but you also knew they were in a
24 sexual relationship, how would you respond to that? Would you
25 serve them communion?

1 A Absolutely. Absolutely.

2 Q Why is that?

3 A Well, they are children of God who are seeking
4 participation in the table of the Lord. I mean, to me, this is
5 what Jesus was all about. I can't imagine barring someone from
6 the Holy Eucharist. Jesus came first to the marginalized, the
7 sinful, the people who had been ostracized by the establishment
8 and said, *Come on in*. You know, this is what Jesus was all
9 about, showing God's love. While we were yet sinners, Jesus
10 came to us and welcomed us back home. So who would I be to bar
11 someone from communion when they are seeking grace and peace
12 and the love of God.

13 Q And if that same couple came to you and asked you to
14 perform their wedding and you knew that they had a sexual
15 relationship before being married, how would you respond to
16 that?

17 A I would be overjoyed. Hallelujah. Come on. Of course,
18 you know, we want to make sure that through premarital
19 counseling that this is a couple that really needs to be
20 together and then through prayer and consideration, you know,
21 we say, *Yes, let's honor this relationship and let's* -- the
22 thing about marriage is, it's not just between the two people.
23 It's not just between -- it is a covenant between the couple
24 and the community, much like what the rabbi was describing.

25 So in the Episcopal Church, we do the vows between the

1 couple, and then we lift our heads up and say to the
2 congregation, *Will all of you present do all in your power to*
3 *uphold these two people in their life together?* So it is a
4 covenant not -- again not just between the two but between the
5 couple and the congregation. And so whether a couple whose
6 already been intimate decides to honor that and to solidify
7 that relationship and to enter into holy matrimony, that's
8 cause for great celebration.

9 Q Going back for the exhibit just once more, would you read
10 Section 2 line (c) aloud, please.

11 A Sure. "Male (man) or female (woman) refer to an
12 individual's immutable biological sex as objectively determined
13 by anatomy and genetics at the time of birth."

14 Q And how does that line from the statute, how does that
15 compare with your own religious beliefs?

16 A It's not at all in keeping with my own beliefs.

17 Q And what are those beliefs that you have on this topic?

18 A From time to time people are born with a gender identity
19 that is incongruous with their -- the manifestation of their
20 physicality, and those people often undergo great
21 psychological, emotional, and spiritual distress. And so they
22 deserve our care and our love.

23 And, you know, here's the thing. There have always been
24 homosexuals. There are always been homosexuals. It is not a
25 fad or nothing new. There have always been transgender people,

1 as the rabbi noted. There are always been transgender people.

2 When you read in the Bible about eunuchs, eunuchs are
3 transgender people. And St. Philip was happy when he was able
4 to preach the gospel to the eunuch and he accepted Jesus as his
5 Lord and Savior, and that was a glorious day.

6 So if you've ever met anyone who felt that they were in the
7 wrong body, you would understand their pain and their angst and
8 you would understand how good it feels for them to finally be
9 able to be in congruence with who they feel they are on the
10 inside and who they are on the outside.

11 Q Does the Episcopal Church as a whole have any beliefs about
12 gender identity?

13 A At general convention, which I was describing earlier, we
14 have passed several transaffirming resolutions, and we have
15 another committee right now working on developing liturgies for
16 name changes for transgender people.

17 Q If we step back from those specific beliefs for just a
18 moment and look at all three of the briefs listed in the
19 statute together, do these combined beliefs, do they convey any
20 message to you?

21 A Unfortunately, they convey a message to me that the State
22 wants to hold certain people, that would be gay men, lesbians
23 and transgender people, to be less worthy and have less dignity
24 than other human beings.

25 Q And how does the combined message of those three beliefs

1 compare to the teachings of the Episcopal Church?

2 A They would be antithetical, I would think. You know,
3 Jesus -- I get so frustrated. We have a brand new presiding
4 bishop of the Episcopal Church, the national Episcopal Church
5 named Bishop Curry, and he's talking about the Jesus Movement.
6 We're all about the Jesus Movement. We need to remind people
7 about what Jesus was really about.

8 So there are a couple of things. Like my favorite parable
9 to point to here -- and there are several. But the parable of
10 the good Samaritan. And here's what happens is what German
11 Biblical scholars called the *Sitz im Leben*, the life situation,
12 is lost on us now all of these thousands of years later.
13 Right? We don't understand the sociology of what was going on
14 at the time that Jesus was speaking.

15 So in the parable of the good Samaritan, of course, this
16 young man says, *What must I do to inherit life?* Jesus
17 says -- you know the scripture. Right? And so he says, *Thou*
18 *shall love your neighbor as yourself.* And the question becomes
19 who is my neighbor?

20 So Jesus tells the story of the good Samaritan. There's a
21 man beaten up and laying for dead on the side the road. The
22 Levite goes by, pays him no attention. Priest goes by, pays
23 him no attention. The Samaritan comes by and the Samaritan
24 cares for him and takes him to an inn and pays for his care.

25 So then Jesus asks, *Who was the neighbor?* See, what we

1 don't realize is that Samaritans and Jews hated each other and
2 that Samaritans were dirty unclean dogs. And so that's -- the
3 punchline of that parable was radical and offensive to Jesus'
4 listener, and what he was saying to them is, *These people that*
5 *you marginalize, these people that you call dirty and unclean*
6 *and unworthy, that's your neighbor.*

7 So anytime -- again going back to dignity and worth.
8 Anytime we don't show dignity and value the worth of any human
9 being, then I think we're doing a disservice to the gospel,
10 which is, God loves you so much, right, that he gave his only
11 begotten son and not just you or you and leave out them, but
12 everybody. And so these kinds of things, they break my heart
13 is what they do. They make me very sad.

14 Q And what was your reaction? Was that your reaction as a
15 minister to finding out that HB 1523 had passed?

16 A Yeah, that was certainly part of it. I have to say I was
17 very sad. And then I was very angry because one of the things
18 that happens is that this is represented as the Christian view.
19 This kind of devaluing of the human lives of gay and lesbian
20 and transgender people, that condemnation, that judgmentalism
21 is seen as that's what Christians are. And, no, that is the
22 antithesis of the message of Jesus. That is the antithesis of
23 the gospel.

24 And so I become angry. And then I was listening -- I
25 listened to the debate in the senate, and I was taken with the

1 fact that many African-American senators rose in opposition and
2 said, *This is exactly what they did to us. This is exactly*
3 *what they did to us. They proof texted.* You pull out little
4 pieces of scripture, and you say, *This is -- you know, this is*
5 *why we should be able to oppress these individuals.* And then I
6 see that the governor says, *The only people who are opposing*
7 *this are the secular folks.*

8 No, we've raised our voices. We have let it be known there
9 are Christians out there who have an opposite belief. And then
10 when he says, *Christians will line up to be crucified for this,*
11 that is perverted. That is in my mind blasphemy. Jesus was
12 crucified as an atonement for human sin, not so that we could
13 oppress one another.

14 Q You mentioned that you're also a social worker and a
15 professor of social work.

16 A Yes.

17 Q What was your reaction to HB 1523's enactment as a social
18 worker?

19 A Right away I think about a code of ethics. As a licensed
20 social worker -- all licensed social workers must abide by the
21 code of ethics of social workers. And in the code of ethics,
22 there are several tenets that are in direct opposition of this.
23 First is that we treat every person with dignity and worth --
24 sounds like the Episcopal Church, huh -- also that we strive
25 for social justice for all people, and that we honor human

1 relationships. Now, if I or any other social worker behaves
2 contrary to that code of ethics, we lose our license. So
3 it's -- my personal identity is bound up in this, both as a
4 priest and as a social worker.

5 Q What about as a lesbian Mississippian, what was your
6 reaction, your personal reaction, to of enactment of HB 1523?

7 A Again it's just so sad and that feeling of you're going to
8 make progress, going to make progress, going to make progress,
9 and then no. And I'll tell you that it's -- it's very -- it's
10 a very viscerale feeling, like you're sick to your stomach.
11 One day you are feeling great. You know, my family is great.
12 We have been affirmed. We have been validated. We are almost
13 free.

14 And then when 1523 passed the senate and was signed by the
15 governor, then all that fear, all of that insecurity comes back
16 to the old days when you -- you don't know what restaurant
17 you're going to be able to go into without being denied. You
18 don't know if you're going to be -- if you call -- like I said,
19 keep calling and the air conditioner repairman is going to show
20 up at my house and say, *I'm not going to fix your air*
21 *conditioner because you're gay.* So you don't know except for
22 the people that you've done business with before and those
23 friends of ours who have been kind enough to put up signs on
24 their places of business.

25 This was another thing that bothered me about in the senate

1 debate, there were a couple of other things that really
2 bothered me. So one senator rose to offer a friendly amendment
3 and said, *Okay, clearly y'all are going to pass this, but*
4 *please why can't you get add to this an amend that says, If*
5 *you're going to discriminate, please post a sign to save people*
6 *from going in and being humiliated.* No, wouldn't have it.
7 Wouldn't have it. So that tells me -- what does that tell me?
8 That tells me you want me to walk in and be humiliated.

9 And then, you know, listening to the senator argue for this
10 bill and somebody said -- you know, when you talk about
11 strongly held religious or moral belief, so a senator rose in
12 opposition and said, *What about people who have sincerely held*
13 *moral convictions about alcohol or about gambling?* And she
14 said, the senator in favor said, *No, this is just about LGBT.*
15 She repeated that. I guess y'all have that transcript
16 somewhere.

17 But that -- to sit there as a Mississippian and listen to
18 people talk about you in that way, you know, when we just live
19 our lives and try to be productive Mississippians and
20 contribute to the state, like teach at a public university --
21 my wife runs a nonprofit organization to help people with AIDS.
22 We send our kid to school. We mow our lawn. We pay our taxes.
23 And yet we are singled out as less than by our own government.
24 It's just -- I can't describe it to you.

25 Q That indescribable feeling, have you ever felt anything

1 like it before?

2 A When they passed the law that said I couldn't adopt my own
3 son, yeah.

4 Q Thank you very much for your time.

5 A Thank you.

6 MR. DIETER: No further questions at this time.

7 THE COURT: Okay. Thank you, Mr. McDuff?

8 MR. McDUFF: I have one thing that comes to mind that
9 I'd like to ask her.

10 THE COURT: You may.

11 DIRECT EXAMINATION

12 BY MR. McDUFF:

13 Q I have two things I want to ask you, one of which is
14 biographical. You didn't have time to lay out all of your
15 impressive professional history, but one of the jobs you had
16 was assistant priest at Trinity Episcopal Church in Hattiesburg
17 for a while where my parents were members of your flock.

18 A Yes.

19 Q The church in which I grew up. I want to ask you about
20 this. The statute speaks of sincerely held religious beliefs
21 or moral convictions.

22 A Uh-huh.

23 Q Do you as a minister and as a person of faith, are your
24 sincerely held religious beliefs on these issues something
25 separate from your moral convictions, or are they part and

1 parcel of the same thing?

2 A Oh, they are the same thing.

3 Q Do your moral convictions stem from your religious beliefs?

4 A Absolutely.

5 Q You are the vicar of a church.

6 A Uh-huh.

7 Q You work at a university. I assume you have discussed
8 these issues with a lot of people.

9 A Yes.

10 Q You -- have you discuss these issues with people who agree
11 with you?

12 A Yes.

13 Q And have you discussed these issues with people, including
14 some of your own parishioners, who agree were the positions
15 endorsed by the State?

16 A Yes.

17 Q For these people on both sides of the issues, people of
18 faith with whom you have discuss these issues, are their moral
19 convictions separate from their sincerely held religious
20 beliefs or are they part and parcel of the same package?

21 A They are part and parcel of the same package.

22 Q Do they -- from your conversations with them, do their
23 moral convictions stem from their sincerely held religious
24 belief?

25 A Absolutely.

1 MR. McDUFF: Thank you.

2 CROSS-EXAMINATION

3 BY MR. MIRACLE:

4 Q Good afternoon.

5 A How are you?

6 Q Doctor or Reverend?

7 A Whichever. Susan.

8 Q Reverend Hrostowski, you testified about your last
9 appearance in this courthouse, and I was actually in the
10 courtroom that day.

11 A Yes, sir.

12 Q And you testified about why you were here that day for the
13 adoption. You'd agree with me, wouldn't you, that as it
14 related to the adoption of your son, there was actually a
15 statute that prohibited you -- I think you testified that
16 actually prohibited you from adopting him prior to the change
17 in that law. Is that correct?

18 A That's correct.

19 Q Would you agree with me that unlike the adoption statute
20 that prevented you from legally adopting, you'd agree with me,
21 wouldn't you, that HB 1523 does not have any similar provisions
22 that prevent you from doing anything in your life.

23 A That's correct. I would agree.

24 Q And I should have asked this first, and I'll back up. I
25 presume from your testimony already that you have before coming

1 in here today read HB 1523 from front to back.

2 A Yes.

3 Q So you --

4 A That's not to say I can remember all of it.

5 Q I understand. Some bills are a lot longer than 13 pages so
6 we're glad this one is only 13 pages.

7 A That's right.

8 Q So you would agree with me that unlike the prohibition that
9 you couldn't legally adopt, this bill is different in that
10 respect. There's nothing that you are legally prohibited from
11 doing under this statute. Correct?

12 A That's correct.

13 Q Now, your counsel referred you to I believe you still have
14 it in front of you CSE-2 the letter from the bishop.

15 A Right.

16 Q And it's Bishop --

17 A Seage.

18 Q -- Seage.

19 A It looks like it is "siege" but it is pronounced "sage."

20 Q That's what I thought I understood you to say.

21 A S-E-A-G-E.

22 Q And, Reverend, if you would, turn to page 2 of that letter,
23 if you would, for me. Would you mind reading slowly so the
24 court reporter doesn't get mad at us, read for me the first
25 paragraph on the top of that page 2.

1 A "It is my responsibility as bishop to provide access to the
2 marriage liturgies approved for trial use by general convention
3 2015. I realize that some of our clergy are willing to
4 officiate and solemnize the marriage of same-sex couples while
5 others are not. I respect the faith and ministry of anyone who
6 is 'unable' to solemnize the marriages of same-sex couples
7 because of their own conscience or because of their
8 determination that to do so would cause irreparable harm to the
9 unity of the congregation they serve. All clergy have my
10 support and will not face any disciplinary measures simply
11 because of their personal theological position."

12 And that's from Skirving 2015.

13 Q What is Skirving 2015?

14 A That is -- comes from a document that came out of general
15 convention in 2015. "My only request is that you refer to me
16 any same-sex couples seeking marriage so arrangements can be
17 made to offer these services of the church."

18 Q Thank you. So can you tell me what is your understanding
19 -- I know you didn't write this letter, but what is your
20 understanding as you read that particular paragraph which
21 reflected the sentiments of the bishop?

22 A If there are any clergy in the diocese who prefer not to
23 perform same-sex marriages, that they are not under any orders
24 from the bishop to do so.

25 Q So I take it implicit in that statement is that there are

1 clergy within the denomination that wish not to perform
2 same-sex marriage.

3 A That's correct, uh-huh.

4 Q Now -- and again I know you didn't write this letter, but
5 what is your understanding of the portion of that where he says
6 that, "Because of their own conscience or because of their
7 determination that to do so would cause irreparable harm to the
8 unity of the congregation they serve." What is your
9 understanding of what he meant by that?

10 A In some congregations, there's a split within the
11 congregation where some people believe that gay and lesbians
12 should be able to marry within the church and some don't. And
13 so if the clergy person in some of those churches were to make
14 a decision to go ahead and perform those marriages, it would
15 cause a split. And so then, of course, that would leave the
16 church in bad straights.

17 Q So the divisions are that deep still that the bishop
18 recognizes that to do so could cause actual harm to a
19 congregation causing to it split apart.

20 A Right. In a couple of congregations, yeah.

21 Q What is your understanding of him conveying in this letter
22 that no disciplinary measures would be taken because of their
23 decision not to perform? What disciplinary measures could have
24 been taken?

25 A To be real frank with you, there are not very many. You

1 can be censored, I suppose. But in the Episcopal Church, what
2 happens when people are -- receive discipline -- when a clergy
3 person is disciplined by the bishop, perhaps they would be
4 reassigned for awhile. Or, you know, in worst case scenario
5 they would be asked to rescind their holy orders.

6 Q So as I appreciate what the bishop is conveying is that the
7 clergy is free to make a decision without fear of their
8 denomination taking any action against them. Is that correct?

9 A That's correct.

10 Q Do you have the HB 1523 in front of you?

11 A I do.

12 Q Would you turn to page -- it's going page 2, I believe.

13 Page 2 Section 3.

14 A Uh-huh.

15 Q We've talked a lot today, and you've been in the courtroom
16 the entire day. Correct?

17 A Yes, I have.

18 Q We've talked a lot about Section 2(a), (b) and (c) and the
19 definitions. I want to talk to you a little about some of what
20 the bill actually does. Will you like at Section 3. And if
21 you would, after the number 1, if you would read down to after
22 the word "organization."

23 A "The state government shall not take any discriminatory
24 action against a religious organization wholly or partially on
25 the basis of that organization.

1 Q Thank you. And do you remember the testimony earlier this
2 morning -- and we can refer back to -- if you will look at page
3 11. I'm sorry. Page 12. If you look at the letter (b) at the
4 top of the page. Do you see that?

5 A Uh-huh.

6 Q Could you read that for me?

7 A "A religious group, corporation, association, school, or
8 educational institution, ministry order, society, or similar
9 entity, regardless of whether it is integrated or affiliated
10 with a church or other houses of worship and" -- you want me to
11 keep going?

12 Q That's fine. Thank you. Would you agree with me looking
13 back on the previous page under number 4, what you just read is
14 defining what religious organization means for purposes of this
15 bill?

16 A Yes.

17 Q Okay. Now, based on your testimony, I presume you would
18 not want to see any clergy in your denomination subject to any
19 kind of punishment for their personal beliefs one way or the
20 other, whether it was to solemnize same-sex marriage or to not
21 do so. Correct?

22 A Yes.

23 Q And you'd agree with me that Section 3(1) specifically says
24 that the state government shall not take any discriminatory
25 action against a religious organization wholly or in part for

1 the -- partially on the basis that such organization -- and
2 then it goes on to discuss solemnizing marriages.

3 A Right.

4 Q So would you agree with me that you would not want to see
5 any one of your fellow clergymen subject to any action by the
6 State should they choose not to solemnize a same-sex marriage?

7 A That's correct.

8 Q Would you agree with me that Section 3 protects that from
9 occurring?

10 MS. KAPLAN: Objection, Your Honor.

11 THE COURT: What the basis of your objection?

12 MS. KAPLAN: It's protected by the First Amendment of
13 the United States Constitution.

14 THE COURT: Could you repeat that question, Mr.
15 Miracle?

16 BY MR. MIRACLE:

17 Q You agree with me -- we read the Section 3(1) a moment ago.
18 Correct?

19 A Right.

20 Q It says, "The state government shall not take any
21 discriminatory action against a religious organization wholly
22 or partially on the basis that such organization (a) solemnizes
23 or declines to solemnize any marriage."

24 A Uh-huh.

25 Q All I'm asking you is: You would agree with me that you

1 would not want to see any one of your fellow clergy members
2 disciplined by your own denomination or by the State, for that
3 matter, for not solemnizing the same-sex marriage, would you?

4 A Yes.

5 Q You would not --

6 THE COURT: Hold on. Before you answer, what's the
7 basis of your objection?

8 MS. KAPLAN: "Denomination" is fine. The use of the
9 word "or by the State" is -- he knows that's an improper
10 question because the State has no authority for 250 years in
11 this nation to discipline a clergy for not following religious
12 doctrine.

13 MR. MIRACLE: Your Honor, that's a speaking objection.

14 THE COURT: Repeat the question.

15 BY MR. MIRACLE:

16 Q I was simply reading from the statute which says that,
17 "State government" --

18 THE COURT: But point the court directly to what --
19 where you are reading from from the statute?

20 MR. MIRACLE: Page 2, Section 3(1).

21 THE COURT: Now, repeat your question.

22 BY MR. MIRACLE:

23 Q You understand what we have just had you read. Correct?

24 A Right.

25 Q My question is: You would agree with me that you -- based

1 on your prior testimony, as I appreciate it, you would not want
2 to see any of your fellow clergy members subject to any
3 disciplinary action by the state government as set forth in
4 Section 3(1) or by your own denomination.

5 THE COURT: Any objection?

6 MS. KAPLAN: Not to that question, Your Honor.

7 THE COURT: Okay. You may answer.

8 A I'm a little bit confused in that --

9 BY MR. MIRACLE:

10 Q Let me simplify it. You would not want to see any clergy
11 member of any denomination, your denomination or any other
12 denomination, subject to any disciplinary matters by anyone for
13 not performing a same-sex marriage. Correct?

14 A As -- yes. I'm just going to say yes.

15 Q Thank you. You had indicated that when someone comes to
16 you to marry, you have a process, it sounds like, that you go
17 through. And you indicated, if I appreciated your testimony,
18 that you may choose not to marry a couple, whomever it may be,
19 for a variety of reasons.

20 A That's correct.

21 Q And there could be an infinite number of reasons you make
22 that decision?

23 A That's right.

24 Q Have you ever declined to solemnize a same-sex marriage for
25 any other reasons that you had talked about?

1 A I have.

2 Q Okay. Now, you testified -- and correct me if I paraphrase
3 incorrectly, but you testified that you feel like HB 1523
4 conveys a message that the State wants to hold certain people
5 less worthy. Is that a fair characterization of your
6 testimony?

7 A Uh-huh, yes.

8 Q And as I understand your testimony, you feel yourself to be
9 included in that group of feeling less worthy.

10 A Yes.

11 Q Okay. Your testimony is not that -- strike that. You
12 don't believe that people that hold beliefs that are not the
13 same as yours are less worthy either, do you?

14 A No.

15 Q So the fact that people that may disagree with same-sex
16 marriage, they should not be deemed any less worthy than people
17 who hold the opposite belief, should they?

18 A That's correct. I agree.

19 Q You also testified along these lines that 1523 conveys a
20 Christian view, and I wrote that down. And if I wrote that
21 down incorrectly, please tell me. But that the bill does not
22 convey a message that you want conveyed, but it conveys a
23 Christian view. Would you agree with me that the HB 1523
24 doesn't use the word "Christian" anywhere in it?

25 A Right. I see what you're saying. And you're right. It

1 does not use the word "Christian." And perhaps I misspoke
2 because what I was saying is that it does not reflect a
3 Christian view, but it is labeled as and it is seen as a
4 Christian view because it is endorsed by the Christian right.

5 Q But you'd agree with me nowhere on the face of the bill
6 does it talk about Christian views.

7 A Yes.

8 Q And I believe the question was asked of the rabbi, and he
9 deferred. But I'll ask the same question of you. Are you
10 aware of whether any nonChristian denominations or sects
11 believe doctrinally that same-sex marriage should not be
12 permitted?

13 A I do not know of one.

14 Q You do not know of one where the faith -- explain your
15 answer.

16 A Well, you said "nonChristian." Is that what you said?

17 Q Yes.

18 A Right. I don't know of -- myself personally, I don't know
19 of a nonChristian faith. As the rabbi pointed out, in any
20 denomination there's plurality of thought. So I don't know of
21 any denomination or -- of any nonChristian faith that whole --
22 blanketly says no to gay marriage.

23 Q Are you guessing or are you basing that on anything in
24 particular?

25 A I don't have that knowledge. I don't know. I don't know

1 of one.

2 Q Thank you. Going back to the bishop's letter, I want to
3 make sure I close the loop on this. You had testified earlier
4 that you have spoken to a number of people within your
5 denomination --

6 A Uh-huh.

7 Q -- who hold views on both sides. Correct?

8 A Yes.

9 Q And I believe Mr. McDuff asked you if those people that you
10 spoke to separated moral conviction from their religious
11 beliefs, and I believe you testified that they did not.

12 A Well, let me say this: I can't answer that question for
13 them. My understanding of how moral convictions develop in a
14 person is that they come out of their world view and that their
15 world view is based on their religion, whether that be -- that
16 might be the religion or lack of religion so that a world view
17 of an atheist is going to inform his or her moral convictions.
18 Do you see what I'm saying?

19 Q I just want to make sure when you were responding to
20 Mr. McDuff's question -- let me put it this way: You cannot
21 testify that somebody who does not believe in same-sex marriage
22 doesn't hold that belief for a reason other than religion.

23 A I couldn't testify to that. I couldn't speak for another
24 person.

25 Q It is very possible that people could have a viewpoint that

1 is not religious based and separate from a moral conviction.

2 A Personally I can't really see how that could be, but I
3 can't speak for other people.

4 Q Correct. Thank you. Thank you very much for your time.

5 MR. MIRACLE: Your Honor, I tender the witness.

6 THE COURT: Okay. Redirect?

7 REDIRECT EXAMINATION

8 BY MR. DIETER:

9 Q I just have a few questions. You were asked about whether
10 the word "Christian" appears on the face of this statute.

11 A Uh-huh.

12 Q I take it from your testimony earlier that you listened to
13 the debate, the legislative debate on this. Is that right?

14 A I did.

15 Q When was that?

16 A I guess it was -- was that March 30th?

17 Q When did you listen to the debate?

18 A We listened to it as it was happening over the Internet.

19 Q And during that legislative debate, was the word
20 "Christian" used during the debate?

21 A Yes. Yes, it was. I'm trying to remember which context
22 most -- I remember it most particularly when the
23 African-American senators rose in objection and talked about
24 how they used scripture to justify segregation.

25 Q Before HB 1523 was enacted, did you already have the

1 ability to decide for yourself when you would or wouldn't
2 perform a couple's marriage?

3 A That's correct.

4 Q And regardless of HB 1523 or not, do you believe that the
5 State of Mississippi has any business in disciplining a
6 minister for following or not following particular theological
7 beliefs?

8 A Absolutely not.

9 Q You were also asked just a moment ago about whether HB 1523
10 prohibits you from doing anything. Do you happen to know
11 whether HB 1523 would allow you to enforce a Jackson
12 antidiscrimination ordinance if you and your wife were denied
13 service at a restaurant?

14 THE COURT: Before you answer, what's your objection?

15 MR. MIRACLE: Lack of foundation, calls for a legal
16 conclusion, calls for speculation.

17 THE COURT: I'll overrule it. You may ask your
18 question.

19 BY MR. DIETER:

20 Q The question is simply whether you know if HB 1523 would
21 allow you to enforce a Jackson antidiscrimination provision if
22 you and your wife were denied service at a restaurant.

23 A As I understand it, a person who denied us service could
24 claim an exemption from being sued for discrimination through
25 this bill.

1 Q And I take it you're not an attorney. Is that correct?

2 A I am not an attorney.

3 Q Okay. Thank you very much.

4 THE COURT: Is this witness finally excused?

5 MS. KAPLAN: She is, Your Honor.

6 THE COURT: All right. You may step down. Thank you
7 so much. We'll take a 15-minute break. Court's in recess.

8 (Recess)

9 THE COURT: One thing for purposes of the record. I
10 hope the parties -- the court reporter and I chatted just very,
11 very briefly on our way out. I see that the rabbi is gone.
12 The rabbi said a lot of words that -- again, I'm a good
13 Baptist, and I don't -- but we may have to -- the court
14 reporter might have to call him at some point in time to ask
15 him to spell some of those.

16 MS. KAPLAN: Your Honor, we should be able -- both
17 Mr. Taber and I have some knowledge of this stuff so we may be
18 able to spell a lot for him.

19 MR. TABER: I've got a sheet that I think identifies
20 what you're looking for.

21 MS. KAPLAN: Written in the rabbi's hand.

22 THE COURT: Okay.

23 MR. BARNES: No objection to the cheat sheet.

24 THE COURT: Again we just want to make sure that the
25 record is as accurate as possible. In the English language,

1 sometimes two words spelled the same way can have totally
2 different meanings. Or phonetically, they could definitely
3 have different meanings.

4 Are we ready to call our next witness?

5 MR. McDUFF: Yes, sir. We call Carol Burnett.

6 (Witness Sworn)

7 CAROL BURNETT,

8 Having first been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. McDUFF:

11 Q Good afternoon, Ms. Burnett. You are a plaintiff in this
12 case? Is that right?

13 A That's correct.

14 Q One of the plaintiffs in Barber v. Bryant. Where did you
15 grow up?

16 THE COURT: Just make sure all your responses are
17 verbal.

18 A Okay.

19 BY MR. McDUFF:

20 Q Where did you grow up?

21 A In Mississippi. My dad is a retired Methodist minister and
22 we lived all over the place: Rolling Fork, Purvis,
23 Hattiesburg, Jackson, all over the place.

24 Q Okay. Tell us briefly about your education.

25 A My college degree is from USM, and my master of divinity is

1 from Union Theological Seminary in New York.

2 Q And are you an ordained minister?

3 A Yes, I'm an ordained United Methodist minister.

4 Q Where do you work?

5 A I'm the executive director of two nonprofits. One is a
6 local United Methodist women affiliated service organization
7 called Moore Community House in Biloxi, and one is a state-wide
8 advocacy organization for childcare for low income women, and
9 it's called The Mississippi Low Income Child Care Initiative.

10 Q What does the Moore Community House do?

11 A We provide economic support services for low-income women,
12 early Headstart for families with children birth to age 3 and
13 women in construction job training programs so that women can
14 enter the construction trade so they can earn more money than
15 is typically the case for women in jobs in Mississippi where
16 they are earning --

17 Q Were you the founder of the Moore Community House?

18 A No. Moore Community House has been there for 91 years.

19 Q When did you start -- when did you start working there?

20 A In 1989.

21 Q Okay. And was there a time between 1989 and the present
22 day when you left Moore Community House for a while?

23 A Yes. I went to work in state government for a couple of
24 years to run the -- at that time it was called the Office of
25 Children and Youth at the Department of Human Services.

1 Q Okay. Who was the governor at that time?

2 A Ronnie Musgrove.

3 Q Is he the person who appointed you?

4 A Yes. I was an employee at DHS, and the director of the
5 agency at that time was Betty Ward Fletcher.

6 Q Okay. What is your affiliation as director of the Moore
7 Community House with the United Methodist Church?

8 A I'm their underappointment by the bishop of the Mississippi
9 Conference of the United Methodist Church. I am also an
10 employee -- it is a United Methodist women's organization, but
11 it is an independent nonprofit and has a board of directors.
12 So I'm actually an employee of that local nonprofit
13 corporation, but I serve in that capacity also under the
14 appointment of the bishop.

15 Q Now, when you went to work in state government at the
16 Department of Human Services, did you do that under the
17 appointment of the bishop?

18 A No. I -- in fact, I feel very strongly about separation of
19 church and state, and I took a leave of absence from my
20 ordination for the years that I was working for state
21 government.

22 Q Okay. Are you familiar with HB 1523?

23 A Yes, I am.

24 Q Have you read that bill?

25 A Yes, I have.

1 Q Have you followed the public debate about that bill?

2 A Yes, I have.

3 Q Okay. As you know, Section 2 of HB 1523 specifies three
4 sincerely held religious beliefs or moral convictions that are
5 "protected by this act," and they are the belief and conviction
6 that, "(a) Marriage is or should be recognized as a union of
7 one man and one woman, (b) sexual relations are properly
8 reserved to such a marriage, and (c) male (men) or female
9 (woman) refer to an individual's immutable biological sex as
10 objectively determined by anatomy and genetics at the time of
11 birth."

12 Do you subscribe to those three religious beliefs or moral
13 convictions?

14 A No, I don't.

15 Q What is your belief regarding those subjects? What is your
16 religious belief regarding those subjects?

17 A I believe we are all created in the image of God, that
18 loving relationships exist in marriage and outside of marriage.
19 Certainly that was true for same-sex couples before the country
20 finally made same-sex marriage legal, and that those
21 relationships as they are loving and equitable and respectful
22 can be marriage relationships but are not necessarily marriage
23 relationships. That we were called to be whole, loving and
24 treat one another with compassion and justice.

25 Q What are your religious beliefs regarding the -- whether

1 sexual relations are properly reserved to a marriage between
2 one man and one woman?

3 A I don't subscribe to that belief.

4 Q What are your religious beliefs with respect to whether
5 male or female refer to an individual's biological sex as
6 determined at the time of birth?

7 A I don't subscribe to that belief.

8 Q The bill -- the bill describes these beliefs and moral
9 convictions regarding the three groups of people who are not --
10 who are not protected by this bill or the views about them are
11 not endorsed by this bill and that is same-sex couples who are
12 married or plan to marry, unmarried people who engage in sexual
13 relations, and transgender people. Do you -- as a minister and
14 as a student of religion, what is the message the State is
15 conveying by passage of their bill to those groups of people?

16 A That they are being condemned, that they are sinful and
17 immoral.

18 Q What is the message being conveyed to you in your eyes and
19 others who have different beliefs from those specified in this
20 bill?

21 A That my religious perspectives are less worthy.

22 Q Do you believe the State is endorsing the religious beliefs
23 set forth in this bill?

24 A Yes, I do.

25 Q The bill purports to provide certain protections to

1 religious organizations includes churches and ministers who
2 hold those particular beliefs but not to ministers like you who
3 hold different beliefs. What message does that convey to you?

4 A That this state is choosing sides in a religious debate and
5 giving weight to one religious view and disfavoring another
6 perspective.

7 Q You are a -- let me ask you this first. The statute speaks
8 of sincerely held religious beliefs or moral convictions. For
9 you as an ordained minister, do your moral convictions stem
10 from your religious beliefs?

11 A Yes.

12 Q Are they separate or are they part of the same thing?

13 A No, they are not separate. They are part of the same
14 thing.

15 Q What is the position of the United Methodist Church
16 regarding same-sex marriage?

17 A I have an official position from the Book of Discipline
18 from 2012 that I could share, although this position is
19 currently under consideration for change.

20 Q Okay. Can you read that position, please. The position
21 you're reading now from 2012, is that currently the position of
22 the United Methodist Church?

23 A Yes. The Methodist Church has general conferences every
24 four years, and the 2016 general conference just concluded.
25 And these positions were debated at that conference, and the

1 conclusion of that conference was that these positions would
2 remain in effect for the moment but that the council of bishops
3 has been asked to essentially review these positions to come
4 back with a revised position for the church at the next general
5 conference which will be a special called conference because
6 the church wanted to act on this sooner than four years from
7 now.

8 Q Okay. And when will that next conference be? Do you know?

9 A The date hasn't been set on that yet.

10 Q Would you read the positions that currently remain as the
11 positions of the United Methodist Church on this issue?

12 A "The practice of homosexuality is incompatible with
13 Christian teaching; therefore, self-avowed practicing
14 homosexuals are not to be certified as candidates, ordained as
15 ministers, or appointed to serve in the United Methodist
16 Church."

17 Q Let me interrupt you there. Is there a particular
18 paragraph of the book of discipline that you just read?

19 A Yeah. 304.3.

20 Q Okay. And then is there another paragraph that's relevant
21 to this?

22 A 341.6 reads, "Ceremonies that celebrate homosexual unions
23 shall not be conducted by our ministers and shall not be
24 conducted in our churches."

25 Q Do you believe that the passage of HB 1523 endorses the

1 current position of the United Methodist Church on these
2 issues?

3 A As I just read, yes.

4 Q You talked about the fact that there is a debate in the
5 church and that this is going to be discussed further in the
6 future. How do you feel about the State of Mississippi passing
7 this law in the midst of that debate?

8 A It weighs in on a debate that is happening within the
9 church on one side of a religious issue that is being
10 debated -- I mean, the United Methodist Church, the membership
11 of the United Methodist Church as reported by *Christianity*
12 *Today* in an article covering this debate at the general
13 conference reported that the majority of the United Methodists
14 in the country support changing these positions to support
15 same-sex union and to support a more accepting and supportive
16 and equal position on the topic of same-sex marriage and
17 homosexuality and the ordination of homosexual pastors.

18 So that is a topic that is being hotly debated in the
19 church right now, and for a state government to weigh in on
20 that church debate is not a role for government to play in my
21 opinion.

22 MR. McDUFF: That's all. Thank you.

23 THE COURT: I presume the other plaintiffs have no
24 questions of this witness?

25 MS. KAPLAN: We do not, Your Honor.

1 THE COURT: All right. Thank you. Mr. Goodwin.

2 MR. GOODWIN: Yes, Your Honor. May I proceed?

3 THE COURT: Yes, you may.

4 MR. GOODWIN: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. GOODWIN:

7 Q Reverend Burnett, thank goodness we finally got around to
8 some Methodists. I'm a fellow Methodist. I just have a few
9 questions for you.

10 A Sure.

11 Q You're a plaintiff in this case. Right?

12 A Yes, I am.

13 Q And I've looked at your declaration that you submitted, and
14 this is something I just need to clarify for the record. I'm
15 not trying to embarrass you or offend you in any way. But I
16 need to clarify what your position is in this case as a
17 plaintiff. Okay?

18 A Yes, I understand.

19 Q Are you a member of the LGBT community, yourself
20 personally?

21 A I am not.

22 Q Are you a member of the transgender community specifically?

23 A I am not.

24 Q Okay. And do you feel like the provision in HB 1523 with
25 regards to sex outside of marriage, that that discriminates

1 against you personally in some way?

2 A It does not.

3 Q Okay. All right. Now, you've just testified about the
4 fiery debate that is currently going on in the United Methodist
5 Church. Correct?

6 A Yes.

7 Q And that fiery debate is with regards to homosexuality and
8 same-sex marriage. Correct?

9 A Yes, it is.

10 Q And there are people within the United Methodist faith that
11 are on either side or both sides of this argument. Correct?

12 A Yes, that's correct.

13 Q And there are churches that have staked out positions on
14 one side or the other. Correct?

15 A Yes, that's correct.

16 Q And, in fact, do you know of some churches that have
17 actually split as a result of this issue?

18 A I don't have personal knowledge of that.

19 Q These beliefs -- strike that. This debate is also raging
20 in other denominations as well. Correct?

21 A Yes.

22 Q Such as the Episcopal denomination. Correct?

23 A Yes.

24 Q And every other denomination of Christianity, to your
25 knowledge -- correct -- is debating this issue?

1 A Well, some have made denominational decisions different
2 than the position of the United Methodist Church, and so the
3 division among the membership varies from congregations that
4 are far more aligned with opposition to same-sex marriage, and
5 some are far more aligned with support.

6 Q So some denominations have taken positions that are closer
7 in kind to the United Methodist Church and some others have
8 taken positions that are slightly different.

9 A Right.

10 Q Correct?

11 A But these are religious matters, and from my perspective,
12 there isn't a role for state government to play to weigh in on
13 these religious -- differences that are being argued among
14 religious denominations -- you're talking about churches, and
15 I -- I see no place for the State to weigh in in support of one
16 particular religious view over another religious view.

17 Q Do you believe that the three beliefs identified in HB 1523
18 favor one particular denomination over others?

19 A I believe that they favor a particular religious view over
20 others.

21 Q But not a denomination?

22 A I believe that they favor denominations that don't -- that
23 have taken positions that don't align with 1523.

24 Q To your knowledge, are the beliefs and convictions
25 identified in 1523 held by members of other faiths other than

1 Christianity?

2 A I'm sorry. Could you repeat that?

3 Q Certainly. Certainly. My wife asks me to all the time.
4 I'll do it. Are the -- we're talking about the three beliefs
5 or convictions that are identified in HB 1523. Are those
6 beliefs, for example, that marriage should on be between a man
7 and a woman --

8 A I know the beliefs that are identified there.

9 Q Is that belief in particular, the first one on that list,
10 is that particular to Christianity? Are there other faiths
11 that hold that belief as well?

12 A I don't know. I'm not able to answer that question.

13 Q Okay. Fair enough. As to -- Mr. McDuff was asking you
14 about earlier whether or not your moral convictions and your
15 religious beliefs were one in the same or if they were
16 separate. Correct?

17 A Yes.

18 Q You stated that for you it's one in the same. Correct?

19 A That's correct, yes.

20 Q But you can't speak for other people on that issue, can
21 you?

22 A I cannot.

23 Q So there could be people out there that are against
24 same-sex marriage based on a moral conviction that has nothing
25 do with a religious belief. Isn't that possible?

1 A It's possible, but I couldn't speak to that.

2 Q Okay. And again you can't speak for them?

3 A Right.

4 Q Okay. You can only speak for yourself as to that. Right?

5 A Yes.

6 MR. GOODWIN: Court's indulgence one moment, Your
7 Honor.

8 THE COURT: Yes, Mr. Goodwin.

9 (Short Pause)

10 MR. GOODWIN: I tender the witness, Your Honor.

11 THE COURT: All right. Redirect.

12 REDIRECT EXAMINATION

13 BY MR. McDUFF:

14 Q Ms. Burnett, as an ordained minister and as a person who
15 has studied religion, can you imagine a person of faith who has
16 a religious belief about these issues having a moral conviction
17 that is not part of that religious belief?

18 A No.

19 Q I want to clarify one thing you said a minute ago. You
20 were talking about denominations. Does HB 1523 favor the
21 denominations that subscribe to the views set forth in HB 1523?

22 A Yes.

23 Q And does it by contrast disfavor the denominations who do
24 not subscribe to those views?

25 A Yes. Did I say that backwards earlier?

1 Q I'm not sure. I just wanted to clarify it.

2 A I may have.

3 Q You were asked if you were part of any of the three groups
4 that you earlier described as being condemned by HB 1523 and
5 being called sinners and immoral, and you aren't. How does it
6 make you feel that your state government has passed a bill that
7 condemns these three groups of people?

8 A I very much oppose the condemnation of the people who are
9 identified by 1523 so it makes me -- it makes my angry. I'm
10 opposed to it, and it makes me feel like the religious
11 perspective and the religious beliefs, the sincerely religious
12 beliefs, that I hold are disfavored by the State whereas
13 religious beliefs that I do not subscribe to are given
14 preference by the State.

15 Q Thank you.

16 THE COURT: Is this witness finally excused?

17 MR. McDUFF: Yes, Your Honor.

18 THE COURT: Ms. Burnett, you may step down. Plaintiff
19 ready to call its next witness?

20 MR. McDUFF: We call Brandiilynne Mangum-Dear.

21 BRANDIILYNE MANGUM-DEAR,

22 Having first been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. McDUFF:

25 Q Good afternoon.

1 A Good afternoon.

2 Q Reverend Mangum--Dear, are you a plaintiff in the case of
3 Bryant -- Barber v. Bryant?

4 A I am.

5 MR. McDUFF: Do you need her to spell --

6 A My mother spelled it wrong.

7 BY MR. McDUFF:

8 Q Where do you live?

9 A I live in Hattiesburg.

10 Q All right. Where did you go up?

11 A A grew up in Waynesboro actually. I try not to tell
12 everybody that, but that's where I'm from.

13 Q What is your occupation now?

14 A I am the founding pastor of Joshua Generation MCC.

15 Q What does MCC stand for?

16 A Metropolitan Community Church.

17 Q Okay. Is your church, Joshua Generation Metropolitan
18 Community Church, also a plaintiff in this case?

19 A Yes.

20 Q Are you married?

21 A I am.

22 Q To whom?

23 A Susan Mangum.

24 Q Okay. And Susan Mangum: Is she also a plaintiff in this
25 case?

1 A She is.

2 Q What is Susan Mangum's position in the church?

3 A She is our worship leader, the director of music.

4 Q Okay. All right. And was there a time you moved out of
5 Waynesboro into the larger community of Laurel?

6 A Yes.

7 Q The metropolis?

8 A Yes.

9 Q And was there a time when you were a pastor at a church in
10 Laurel?

11 A Yes.

12 Q Okay. Were you -- were you the head pastor, associate
13 pastor or what?

14 A I was an associate pastor.

15 Q What is the name of that church?

16 A Christ Church.

17 Q Okay. And was it affiliated with any particular
18 denomination?

19 A It's a nondenomination denomination.

20 Q Okay. Now, obviously you left at some point. When would
21 that have been?

22 A In 2012.

23 Q Okay. Why did you leave that church?

24 A Well, I met Susan, and -- I had started to explore my
25 sexuality, and then I met her, and I decided that I could no

1 longer lie to myself and I decided to leave the church because
2 I knew that I couldn't be in that church and be openly gay.
3 And so I was going to leave, and my pastor wouldn't let me. He
4 told me I was having a midlife crisis, and he moved me into his
5 house with his wife, and a week later I left.

6 Q Was -- were you subsequently the subject of sermons
7 delivered by that pastor?

8 A Yes. My pastor outed me to the congregation and to my
9 community, and the church out me to my family. And I didn't
10 get the opportunity to tell my mother or my son or my dad or
11 anyone.

12 Q They heard about it from the pulpit?

13 A Well, I had -- one of my -- one of the members of my
14 ministry team was very close to me and I confided in her what
15 was -- about my feelings for Susan, and she told my pastor and
16 it went downhill from there.

17 Q When did you and Susan marry?

18 A We married in April of 2015.

19 Q Okay. And when did you start the Joshua Generation
20 Metropolitan Community Church?

21 A September 2014.

22 Q Okay. Tell us about the church. What is its membership?

23 A We have about 80 people that regularly attend. We are
24 radically inclusive, probably 90 percent LGBT.

25 Q All right. And what is the Metropolitan Community Church?

1 A The Metropolitan Community Church was founded in 1968 by
2 Reverend Troy Perry. He's a gay man. And he started the
3 church -- started having a meeting in his living room, and
4 there was 12 people at this first meeting, and now we have over
5 400 churches worldwide.

6 Q And what is the -- what are the principles of the
7 Metropolitan Community Church?

8 A Like I said, we are very radically inclusive. We celebrate
9 sexuality. We celebrate the LGBT community and the straight
10 community. And we're Christian -- we're a Christian
11 organization as well.

12 Q Just one moment, please.

13 A Okay.

14 Q We have talked already during this hearing about the three
15 positions set forth in HB 1523 described as the sincerely held
16 religious belief or moral convictions protected by this act.
17 The first one is, "Marriage is or should be recognized as the
18 union of one man and one woman." Does the Metropolitan
19 Community Church share that belief?

20 A No.

21 Q Does the Joshua Generation Community Church share that
22 belief?

23 A No.

24 Q Do you share that belief?

25 A No.

1 Q The second one, "Sexual relations are properly reserve to
2 such a marriage." Does the Metropolitan Community Church share
3 that belief?

4 A No.

5 Q Does the Joshua Generation church share that belief?

6 A No.

7 Q Do you?

8 A I was pastoring the church before I got married, and I
9 assure you I did not take a vow of celibacy, no.

10 Q Okay. All right. And the third one is, "Male (man) or
11 female (woman) refer to an individual's immutable biological
12 sex as objectively determined by anatomy and genetics at the
13 time of birth." Does you the Metropolitan Community Church
14 share that belief?

15 A No.

16 Q Does Joshua Generation Church share that belief?

17 A No. A transgender woman leads -- sings lead in our praise
18 band. So no.

19 Q And do you share that belief?

20 A Absolutely not.

21 Q What do you and the Metropolitan Community Church and the
22 Joshua Generation Metropolitan Community Church believe about
23 these issues?

24 A Well, Reverend Hrostowski said earlier they are incomplete.

25 I do believe marriage is between a man and woman, but I also

1 believe it can be between a woman and a woman and a man and a
2 man and transgender couple as well.

3 So I believe it's incomplete. I believe that we
4 celebrate -- we completely celebrate diversity in our church.
5 I believe that our creator is much bigger and than we give him
6 credit for. I believe that we try to squeeze God however we
7 believe or think of God into books and theologies, and God's
8 much bigger than that.

9 Q The church where you were in Laurel --

10 A Uh-huh.

11 Q -- previously as an associate pastor, were its views on the
12 issue the same views that are set forth in HB 1523?

13 A No. I started a recovery ministry at Christ Church in 2005
14 for drug addicts and alcoholics, and oftentimes there would be
15 LGBT people that would come through that ministry, and we were
16 taught that homosexuality was a moral failure, it was a sin
17 problem. So we tried to help drug addicts and alcoholics
18 recover from their addiction, but we also tried to help
19 homosexuals recover are their condition as well. We viewed it
20 as a problem. So we tried to pray the gay away, in a sense. I
21 came from a Pentecostal type church. It was a spiritual
22 problem.

23 So it was really hard for a lot of the people that came
24 through the ministry. They didn't make it. They didn't --
25 they didn't get sober, they didn't get clean because we're

1 telling them that you can't be in a loving relationship
2 because, you know, your sexuality is a sin.

3 Q You're talking about the gay and lesbian people that came
4 through?

5 A Yes, yes.

6 Q In terms of that church's leadership and its positions,
7 does it agree with the positions set forth in HB 1523 -- I'm
8 talking about your old church in Laurel -- that marriage is or
9 should be recognized as a union of one man and one woman?

10 A Absolutely.

11 Q And does it agree with the position set forth in the bill
12 that sexual relations are properly reserved for such a
13 marriage?

14 A Absolutely.

15 Q I'm talking about officially, not in everyone's practice.
16 And does it agree with the position that male or female refer
17 to an individual's immutable biological sex as objectively
18 determined about anatomy and genetics at time of birth?

19 A Yes.

20 Q And for that church -- for the leadership of that church on
21 these issues, was it just a disagreement with gay and lesbians,
22 transgender people, or was it a belief that they are sinners
23 and are immoral?

24 A Yes, it was a belief that they are sinners. It was part of
25 the doctrine that was taught. There were many sermons, antigay

1 sermons, that were preached from the pulpit there.

2 Q Did -- were gay and lesbian people welcome in that church?

3 A In the words of my former pastor, they are welcome as long
4 as they are willing to change.

5 Q In your church, are straight people welcome?

6 A Absolutely, as long as they are willing to be themselves.

7 Q Tell me about the ministries at your church.

8 A We have an incredible church. We have -- of course, we
9 have a recovery ministry as well. I developed a 12-step
10 curriculum when I was at my former church and I brought it over
11 to our new church.

12 Q You're talk about recovery from --

13 A Recovery for drug addicts and alcoholics, yes. We let
14 people be gay. We don't make them take the 12 steps anymore.
15 That was a joke.

16 We have a young adult ministry, which is actually led by a
17 transgender woman. It's for 18 and up. We have a youth
18 ministry for grades 8 through 12. We have a children's
19 ministry. We have -- we're actually getting ready to start a
20 recovery ministry for those who have been victims of spiritual
21 abuse.

22 Q Okay. And what do you mean when you talk about victims of
23 spiritual abuse?

24 A Well, I feel as if coming from the church that I was in I
25 was spiritually abused with scripture and doctrine that told me

1 and taught me that I was a moral failure, that I was an
2 abomination, that I was evil because of the way that I love and
3 because of my sexual orientation. That caused me damage, and I
4 believe that scriptures are used in such a way that it brings
5 harm to people, and it's the same as verbal abuse or physical
6 abuse. It causes harm, but it's spiritually.

7 Q Your church obviously includes married, gay, and lesbian
8 people, includes transgender people. As far as you know, does
9 it include unmarried people who engage in sexual relations?

10 A Probably.

11 Q Okay.

12 A Yes.

13 Q What do you think about the fact that the State of
14 Mississippi has passed a law that provides special protection
15 to -- exclusive protection to people who hold different
16 religious beliefs about these groups of people that are in your
17 church than you hold?

18 A Well, it means that my beliefs are invalid. It speaks very
19 clearly that the church that I was formerly a part of is
20 protected because their beliefs are correct and mine are
21 incorrect for some reason. It's degrading and hurtful.

22 MR. McDUFF: That's all the questions I have. Thank
23 you.

24 THE COURT: All right.

25 MR. GOODWIN: One moment, Your Honor.

1 THE COURT: Okay.

2 MR. GOODWIN: No questions, Your Honor.

3 THE COURT: All right. I have one question. I just
4 have one question.

5 EXAMINATION

6 BY THE COURT:

7 Q You indicated that you married in April of 2015.

8 A Yes.

9 Q Was that in Mississippi?

10 A No, sir. We went to Palm Springs in California to get
11 married.

12 Q Okay. All right.

13 THE COURT: Any followup based on that question that
14 I've asked?

15 MR. McDUFF: No, Your Honor.

16 MR. GOODWIN: No, Your Honor.

17 THE COURT: You may step down.

18 MR. KAYE: Your Honor, our next witness is Kathy
19 Garner.

20 (Witness Sworn)

21 THE COURT: Ms. Garner, you have been outside so
22 that's the microphone before you. You do not have to speak
23 directly into it. Please speak loudly and clearly enough for
24 the court reporter to hear you. Speak at a pace at which she
25 can keep up with you. Make sure you allow the attorneys to

1 finish their question before you begin to speak and make sure
2 all your responses are verbal. And could you spell your first
3 name. Is it with a C or K?

4 THE WITNESS: With a K. Thank you for asking.

5 KATHY GARNER,

6 Having first been duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. KAYE:

9 Q Good afternoon, Ms. Garner.

10 A Good afternoon.

11 Q Would you say your full name for the record, please.

12 A My name is Kathryn McLaughlin Garner.

13 Q Thank you. What is your job?

14 A I'm the executive director of the AIDS Services Coalition
15 in Hattiesburg.

16 Q And what's the AIDS Services Coalition of Hattiesburg do?

17 A We are community-based organization that serves people who
18 are infected and affected by HIV.

19 Q How was the AIDS Services Coalition founded?

20 A In 2002, a man by the name of Bruce Vannostrand, who was a
21 member of Trinity Episcopal Church in Hattiesburg was working
22 on becoming a deacon in the church. As part of that process,
23 the Episcopal Church has a very large outreach component to it.
24 He was looking for an opportunity to provide service to the
25 community, and he talked to I believe probably -- I think it

1 was the Catholic -- person from Catholic Charities. They said
2 people who are HIV positive are being kicked out of their
3 housing and that moved him to action. He was sort of a bull in
4 a china shop on a good day. And he went to several of his
5 friend at church and said *You, You, You: You are my board of*
6 *directors. We are the AIDS Services Coalition. And by the*
7 *way, I just bought a house.* And so that's 121 Haven House
8 started.

9 Q Okay. And when did you start working at the AIDS Services
10 Coalition of Hattiesburg?

11 A 2005.

12 Q Why did you choose to go work there?

13 A Well, I was -- I was working outside of this field. I was
14 a volunteer with the AIDS Services Coalition for the years
15 before, but my wife Susan came home from school one day and
16 said, *AIDS Services Coalition, 121 Haven House, is going*
17 *reopen.* It had closed. Bruce died six months after it opened
18 of a massive coronary, and it had struggled.

19 *They are going to reopen it. They have a small grant.*
20 *They are going to hire a social worker to run it.* And out of
21 my mouth came, *They don't need a social worker. They need me.*
22 And I think it was sort of a continuation of my life. I'm
23 passionate about homelessness and about HIV, and who could be
24 blessed enough to have two passions? And it fit with my belief
25 system as an Episcopalian and as a person that I felt as a

1 ministry to me.

2 Q Okay. Now, you mentioned 121 Haven House as one of the
3 services provided by the AIDS Services Coalition of
4 Hattiesburg. Are there other services that you provide as
5 well?

6 A Yes. 121 started as just that shelter with supportive
7 services. But what we tried do over the years -- and our board
8 as an organization is nimble. We have fabulous medical care,
9 but there are a lot of things about serving people who are
10 positive and people who are at high risk that are not medical.
11 So housing is a huge component. We have added women's housing
12 for women who are HIV positive or at high risk. We've also
13 become the provider of HOPWA, which is Housing Opportunities
14 for People with AIDS, which is a housing assistance program.
15 We cover 73 of the 82 counties in Mississippi.

16 Another important part of what we do is for people who are
17 at high risk, those people who are affected by HIV. So we do
18 HIV testing. We have an education component where we do
19 prevention education. We provide condoms through free mail
20 order. We do -- we provide 75,000 condoms to the
21 communities -- to people in communities all over Mississippi
22 every year.

23 Q And do you provide counseling services as well?

24 A As a part of our testing, yes.

25 Q And why do you provide counseling services?

1 A They would have to go together. When you are providing an
2 HIV test to someone, you are potentially changing their life
3 forever. And as a part of that testing, we provide counseling
4 to help them understand the impact of their decisions. We work
5 with them on ways that they may can configure plans to keep
6 themselves and their loved ones safe, if they are not negative.

7 If the test does come back positive, then we work with them
8 to make sure that they are linked to care, which is critically
9 important, and to discuss all of those things in a way that
10 allows them to understand that we are -- we care for them.

11 Q I'd like to come back to the linkage to care in a moment.
12 But first I want to ask: Why does the AIDS Services Coalition
13 provide all of these services together? Why housing and
14 outreach and testing and all of that?

15 A Very good question. If -- when people are -- have risky
16 behavior or HIV positive, there are so many components to those
17 decisions and those factors in their lives. And if we are not
18 able to provide a continuum of care for those folks, long term
19 you're not going have really good outcomes. If people who are
20 positive are not in adequate housing or do not receive
21 supportive services, they are less likely to be in care.

22 Q If they are not in care?

23 A They will become sicker and they will die.

24 Q What is the goal of providing this continuum of care?

25 A Well, the goal is to have a healthier population of folks

1 who are HIV positive and eventually to stop HIV and its impact
2 on our community. When people are healthy, they are less
3 likely to transmit their illness. So public health at stake
4 really. It is a public health issue.

5 Q As well as individual health.

6 A Absolutely.

7 Q Does viral suppression mean anything to you?

8 A Uh-huh. Yes, it does. It means a lot to me.

9 Q What is that?

10 MR. MIRACLE: Your Honor, I object to relevance at
11 this point. He may be going in a direction I think -- at this
12 point, these questions are not relevant to the issues we are
13 here about today.

14 MR. KAYE: Your Honor, I think you'll see where we are
15 going very shortly.

16 THE COURT: Okay. I'll overrule the objection. The
17 question was viral suppression?

18 MR. KAYE: Yes.

19 THE COURT: What does viral suppression mean to you?
20 Right?

21 MR. KAYE: Yes.

22 THE COURT: Okay. Overruled.

23 A Viral suppression with someone who is HIV positive means
24 that there is a very minimal presence of the virus in someone's
25 blood.

1 BY MR. KAYE:

2 Q And if someone reaches viral suppression, as you were
3 saying --

4 A They were highly unlikely to transmit their illness, and
5 they are much healthier.

6 Q What are the biggest obstacles to reaching viral
7 suppression in an individual?

8 A Continuity of care. There are so many barriers along the
9 way to help for people who are marginalized. And being able to
10 access care -- stigma in Mississippi is a huge, huge issue and
11 actually going to -- going to a doctor linking yourself to care
12 in the first place and staying in care is critically important,
13 but it's also very, very scary for a lot of people.

14 Q Why is it scary?

15 A Stigma creates fear in folks to the extent that they are
16 scared that they will lose their housing or lose their job,
17 many other opportunities. We have actually had a client
18 several years ago who -- he lived in a mobile home park, and
19 somehow his status got out in his neighborhood, and we had to
20 physically help him get out of there because they were shooting
21 the windows out, people in the trailer park. So stigma is
22 real, but they may really be out to get you too. Stigma is
23 terrible. The fear, it is the about not knowing.

24 Q And how do you approach that with the way you serve the
25 community you serve?

1 A The best way to combat stigma is through education and
2 through treating people who are HIV positive or who are at high
3 risk in a nonjudgmental fashion.

4 Q Who is the community that the AIDS Services Coalition
5 serves?

6 A We serve everyone.

7 Q Gay and straight?

8 A Yes, sir.

9 Q Married/unmarried?

10 A Yes, sir.

11 Q Why?

12 A Because HIV knows no color or gender or race or sexual
13 orientation.

14 Q Do you care about any of those distinctions in who you
15 serve?

16 A Absolutely not.

17 Q Ma'am, are you familiar with HB 1523?

18 A Yes, sir.

19 Q And are you aware that counseling or psychological services
20 could be denied based on one of three preferred religious
21 beliefs identified in that bill?

22 A Yes, sir.

23 MR. MIRACLE: Object to characterization.

24 THE COURT: Rephrase your question.

25 BY MR. KAYE:

1 Q Are you aware that under HB 1523 there is an exemption for
2 providing counseling or psychological services based on
3 personal religious beliefs?

4 A I am aware.

5 Q And if HB 1523 went into effect on July 1st, what could be
6 the consequences of that for the people that you serve?

7 MR. MIRACLE: Objection, Your Honor, calls for
8 speculation.

9 BY MR. KAYE:

10 Q In your capacity as the executive director of the AIDS
11 Services Coalition of Hattiesburg, do you have concerns about
12 the population that you serve if HB 1523 went into effect?

13 A I do.

14 Q What are they?

15 A My biggest concern is that people will not get tested in
16 the first place.

17 Q Why?

18 A Because of the fear of being turned away, not that we would
19 do that but the fear of being turned away, the fear of not
20 being able to be tested, and the fear of being judged.

21 Q And if someone were tested and tested positive for HIV and
22 then were denied counseling services or psychological services,
23 in your capacity as the executive director of the AIDS Services
24 Coalition, do you have concerns about what might happen then?

25 A People who do not participate in linkage to care are not

1 going to be active in their health care, and they will not --
2 they will not reach the golden ticket, the viral suppression
3 that we hope that everyone reaches. And if they do not
4 participate in that care, once again, HIV if not treated leads
5 to death.

6 MR. KAYE: No further questions at this time.

7 THE COURT: I presume no questions from the other
8 plaintiffs?

9 MR. McDUFF: That's correct, Your Honor.

10 THE COURT: All right.

11 CROSS-EXAMINATION

12 BY MR. MIRACLE:

13 Q Good afternoon, Ms. Garner. My name is Doug Miracle.

14 A Yes, sir.

15 Q I represent Attorney General Jim Hood and Judy Moulder in
16 this case. You are not a plaintiff in this case. Is that
17 correct?

18 A No, sir.

19 Q And your wife is a plaintiff in this case. Is that
20 correct?

21 A She is.

22 Q And can you just tell me why you chose not to be a
23 plaintiff in the case?

24 A I don't know that I was not really a participant. Part of
25 what I think that -- I don't really know on that -- I can't

1 tell you why I wasn't. I'm trying to think. They asked Susan
2 because of her expertise.

3 Q Fair enough. Now, you testified that you're familiar with
4 HB 1523 --

5 A Yes, sir.

6 Q And have you read 15 -- HB 1523?

7 A Yes, sir.

8 Q When did you last review the bill?

9 A I don't recall, to be honest. I know that it was probably
10 within the last month or so.

11 Q And did you watch any of the legislative debate during the
12 legislative session?

13 A I did.

14 Q Are you familiar -- let me ask you this. You've testified
15 about your work with AIDS counseling and you testified about
16 stigma being a problem in the community of people that may or
17 may not be affected or already are infected. Is that correct?

18 A Yes.

19 Q And is it fair to say that that stigma existed prior to the
20 passage of HB 1523?

21 A I think to a certain extent, yes.

22 Q Is it fair to say from your experience in your counseling
23 with HIV or people potentially affected with HIV, you've
24 experienced problems with people -- you testified about people
25 being afraid to come get tested and things of that nature. You

1 testified that --

2 A Yes.

3 Q You testified --

4 A I didn't quite get the question. Yes, sir.

5 Q So that already was an issue that you faced in your
6 counseling in trying to encourage people to come forward.

7 A No, I think you that was a -- I think was when Josh had
8 asked about what my fear was that people wouldn't get tested
9 after 1523.

10 Q Did you have any experience -- or have you had experience
11 in the past with people being afraid to come forward and get
12 tested in the past?

13 A People have been reticent but not fearful.

14 Q Not readily willing all the time to come forward. Would
15 that be a fair characterization?

16 A Right.

17 Q Are you aware if HB 1523 contains any provisions with
18 reference to counseling for AIDS patients?

19 A I know that there is a component to counseling which was
20 discussed as a part of my testimony.

21 Q Do you have any familiarity or do you know whether or not
22 anything in HB 1523 discusses potential treatment of AIDS
23 patients?

24 A I do not.

25 MR. MIRACLE: One moment, Your Honor.

1 THE COURT: Yes, sir.

2 (Short Pause)

3 MR. MIRACLE: Thank you, Ms. Garner. I tender the
4 witness.

5 THE COURT: Redirect?

6 MR. KAYE: Just a few questions. I'm sorry. Just one
7 moment.

8 REDIRECT EXAMINATION

9 BY MR. KAYE:

10 Q Ma'am, do you know what the preferred religious beliefs
11 identified in HB 1523 are?

12 MR. MIRACLE: Objection, Your Honor.
13 Mischaracterization as to preferred religious beliefs.

14 MR. KAYE: Your Honor, may I approach?

15 THE COURT: Yes. Yes, you may approach.

16 BY MR. KAYE:

17 Q I'm going to hand you what's been marked as Defendant's
18 Exhibit 1.

19 THE COURT: Objection overruled. I never ruled on
20 that objection. I never ruled on the objection.

21 MR. KAYE: All right.

22 A I was impressed.

23 BY MR. KAYE:

24 Q I'd like to direct you to Section 2(b), right on the bottom
25 of that first page there.

1 A Uh-huh, yes, sir.

2 Q And what does that say?

3 A "The sincerely held religious beliefs or moral convictions
4 protected by this act or the belief or conviction that (a)
5 marriage is or should be recognized as the union of one man and
6 one woman, (b), sexual relations are properly reserved to such
7 a marriage."

8 Q You can stop there.

9 MR. MIRACLE: Your Honor, I'm going to object. This
10 is improper redirect. I didn't cover any of this on cross with
11 her on Section 2(b).

12 THE COURT: Objection is sustained.

13 BY MR. KAYE:

14 Q Okay. You can set that document aside. Ms. Garner, do you
15 know if many of the people served by the AIDS Services
16 Coalition have sex outside of marriage?

17 A Yes.

18 Q And does that matter for whether or not you serve them?

19 A No.

20 Q And do they need your services?

21 A Yes.

22 MR. KAYE: No further questions.

23 THE COURT: Is this witness finally excused?

24 MR. MIRACLE: I apologize. I was talking to
25 cocounsel. Nothing further, Your Honor.

1 THE COURT: You may step down. Thank you for your
2 testimony.

3 MS. KAPLAN: Your Honor, for our final witness for
4 today plaintiffs call Joce Pritchett.

5 (Witness Sworn)

6 THE COURT: Ms. Pritchett, you have not been in the
7 courtroom so that's the microphone before you. You don't have
8 to speak directly into it. Speak loudly and clearly enough for
9 the court reporter to understand you.

10 THE WITNESS: Okay.

11 THE COURT: Speak at a pace at which she can keep up
12 with you. Allow your attorneys -- the attorneys to finish
13 their question before you begin to speak and make sure all your
14 responses are verbal.

15 THE WITNESS: Okay.

16 THE COURT: Thank you.

17 JOCE PRITCHETT,

18 Having first been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MS. KAPLAN:

21 Q Can you please state your full name for the record.

22 A I'm Jocelyn Pepper Pritchett.

23 Q And, Ms. Pritchett, I apologize. What time did you start
24 sitting outside the courtroom this morning?

25 A 9 a.m.

1 Q You've been sitting on some hard benches for an awful long
2 time. I apologize.

3 A Very small room out there.

4 Q What is your age?

5 A I'm 48.

6 Q And what is your current address?

7 A [REDACTED], Jackson.

8 Q And where were you born?

9 A In Charleston, South Carolina.

10 Q Where did you grow up?

11 A A little town in --

12 Q All right, sir.

13 THE COURT: For purposes of the record, the court will
14 redact the physical -- the address of this particular -- since
15 you gave her --

16 MS. KAPLAN: Thank you.

17 THE COURT: -- listed her entire address. We'll make
18 sure that's redacted from the record, if you will, madam court
19 reporter.

20 MS. KAPLAN: Much appreciated, Your Honor. I
21 apologize for the oversight.

22 BY MS. KAPLAN:

23 Q Where did you grow up?

24 A Bellefontaine, Mississippi.

25 Q How old were you when you moved from South Carolina to

1 Mississippi?

2 A Mother and daddy moved back when I was six months old.

3 Q For how long did you live in Bellefountaine, Mississippi?

4 A Until I went to college at 17.

5 Q Where did you go to college?

6 A Mississippi State.

7 Q And I apologize because you know I'm a Yankee. Where is

8 Mississippi State located?

9 A Starkville, Mississippi.

10 Q Are you currently married, Ms. Pritchett?

11 A Yes.

12 Q What is the name of your suppose?

13 A Carla, Carla Webb.

14 Q And prior to your marriage to Carla Webb, were you ever
15 married before?

16 A I was.

17 Q Who were you married to before?

18 A Larry Phillips.

19 Q And when did you get -- Larry Phillips is a man?

20 A Yes.

21 Q When did you get married to Mr. Phillips?

22 A In 1989.

23 Q And when was that in connection with your schooling?

24 A I was a senior in college.

25 Q And how long were you married to Mr. Phillips?

1 A About six years.

2 Q And what was the reason for you and Mr. Phillips
3 separating?

4 A I had started to have debilitating panic attacks, anxiety
5 attacks. I wasn't really sure what was going on. I just knew
6 I was getting sick, and I start seeing a counselor, and she
7 kind of helped me through that.

8 Q And did there come a time when you began to be concerned
9 that you might be a lesbian?

10 A Yeah, in counseling. I kind of came out to myself during
11 counseling. I had stopped eating. I had stopped eating by the
12 time I went to see her, and she was concerned for my physical
13 safety, and so she helped me through the divorce, and then she
14 kind of helped me come out to myself. She asked me did I feel
15 like I had to die instead of becoming who I was, and I realized
16 that I did. I did believe that I had to die first.

17 Q Ms. Pritchett, I see that you're having -- this is a
18 difficult topic. And so to the extent you need a break or need
19 some water or need a Kleenex, please don't hesitate to let us
20 know.

21 A Okay.

22 Q During this period when you were suffering these anxiety
23 attacks, why were you so afraid at the idea that you might be a
24 lesbian?

25 A I had never known anybody who was gay. I grew up in north

1 Mississippi in the '70s, kind of in the shadow of the civil
2 rights movement. And the only -- we had three television
3 channels growing up.

4 The only person I had ever known that was gay was my high
5 school algebra teacher, and she had been humiliated and run out
6 of town for having an affair with a woman, and that was really
7 my only experience of anyone who was gay. And so on one hand I
8 was relieved and kind of overjoyed that I understood now what
9 was going on with me, but I was terrified of who I was becoming
10 and what that meant for my future.

11 Q During this period -- what year was this approximately when
12 you left your husband?

13 A '97 or so.

14 Q So during this period in 1997 or thereabouts and when you
15 were meeting this counselor, did you start to tell people that
16 were you were a lesbian?

17 A I did. I came out to my best friend first, my old college
18 roommate. She did not take it well.

19 Q And did you -- after that telling your roommate and she
20 didn't take it well, did you tell other people?

21 A Not so much after that. That experience with her, I think,
22 kind of threw me off for a while. So I start coming out to
23 other gay people as I met them and kind of developed a little
24 bit of a gay community here in Jackson. But I didn't really
25 tell anybody else.

1 Q Did you talk about the fact that you might be gay with --
2 you've already mentioned your counselor.

3 A Right, yes.

4 Q And how did she -- without getting into personal details,
5 how did she make you feel when you talked about that with her?

6 A Oh my God, she really saved my life. She just helped me
7 understand that this is a normal reaction for some people, and
8 she just, I guess, helped me see that I had a future as a
9 lesbian and that I didn't have to be this or that. And she
10 just kind of kept me sane long enough for me to find my way.

11 Q If at the time that you first expressed these concerns to
12 your counselor she had told you that she didn't want to treat
13 you anymore because of a sincerely held religious belief that
14 marriage is only between a man and a woman, how would you have
15 reacted to that?

16 A I don't know that I would be here today if she had acted
17 like that. I think I probably would have been devastated. I
18 certainly probably would not be a healthy normal adult now if
19 that had happened.

20 Q Did there come a time when you moved from Mississippi to
21 another state?

22 A Yes. I left to go to graduate school in Atlanta not too
23 long after I came out.

24 Q And in Atlanta, did you start to talk to people about the
25 fact that you might be -- that were you gay?

1 A I almost never went in the closet in Atlanta. When I got
2 there, I went to Georgia Tech and the community was so diverse
3 and not -- welcoming me. It was almost like they didn't even
4 need to be welcoming. They just -- everyone was who they were,
5 and so I was able to kind of grow and just become myself there.

6 Q And when you -- just so the record is clear, what were you
7 doing in Atlanta during this period?

8 A I went to graduate school at Georgia Tech.

9 Q What were you studying?

10 A Civil engineering and city planning.

11 Q And when you were studying in Atlanta at Georgia Tech, did
12 you from time to time visit your parents and come home to
13 Mississippi.

14 A Yes.

15 Q And when you came home during those periods, did you tell
16 people here that you were a lesbian?

17 A No.

18 Q Why not?

19 A I guess I was still afraid of their reactions. I didn't --
20 I just wasn't willing to be treated differently yet. People
21 look at you differently. When you go from being straight in
22 their eyes to gay in their eyes, something changes. And I just
23 wasn't ready to see them change.

24 Q And while -- did there come a point in time when you moved
25 back home to Mississippi from Atlanta?

1 A Yes. My father died in 2001, and I had a job there after
2 graduate school working at a large engineering firm in
3 Buckhead. And when my father died, my firm let me move back
4 home and work for them still here in Jackson.

5 Q By the way, before your father had died, had you told your
6 parents that you were a lesbian?

7 A I did. My then partner and I went to have a ceremony at
8 the MCC church in Decatur, and I called them kind of to invite
9 them to the ceremony and come out at the same time, which may
10 not have been the best choice, but that's the way I did it.
11 And they just kind of said, *Well, honey, we're not stupid.*
12 *We -- you've been seeing this person and living with her for a*
13 *while so we assumed something was going on.* But they also
14 didn't come to the wedding.

15 THE COURT: Hold on one second. MCC church for the
16 record --

17 THE WITNESS: Metropolitan --

18 THE COURT: Metropolitan?

19 THE WITNESS: -- yes, sir. Metropolitan Community
20 church.

21 THE COURT: Okay.

22 THE WITNESS: The gay church.

23 THE COURT: Okay.

24 BY MS. KAPLAN:

25 Q So you come back to Mississippi. Now you have a new job.

1 A Yes.

2 Q And now that you are back in Mississippi, are you out to
3 people in Mississippi at this point in time?

4 A I started kind of coming out a lot more after I moved home
5 from Atlanta because I guess I kind of -- I had lived in that
6 community for two or three years where there was no closet, and
7 so it was really hard to go back into the closet after having
8 been out. So I kind of just started coming out a little more
9 and more to clients and people one at a time as I felt they
10 were safe.

11 Q And why did you do it people one at a time when you were
12 sure they were safe?

13 A I didn't want to lose my job. I didn't want to not be able
14 to live in the apartment I was living in. I had a lot of, you
15 know, concerns that my life would be in jeopardy, if not
16 physically then at least financially, if I came out all at
17 ones.

18 Q When did you meet your current suppose or wife, Carla Webb?

19 A 2003. I had to ask her the date.

20 Q And where did you meet?

21 A We met in a local bar. They had a lesbian night on
22 Thursdays where we played pool.

23 Q And at what point did your relationship with Carla get
24 serious?

25 A We moved in together about a year later. We kind of dated

1 for about a year.

2 Q And at some point in time did you and Carla discuss the
3 idea of having children?

4 A Yes. We both wanted children, and I was older when we met
5 and so we discussed children early on.

6 Q And did you have any disagreements about that issue?

7 A Well, Carla is a lot more fearless than me, and she was
8 ready to jump in and have kid quickly. I had a lot of fear,
9 and maybe she did too, but she didn't voice it as much. I had
10 a lot of concerns that -- I had a lot of concerns that my
11 children wouldn't be legally safe no matter how we conceived
12 them, and I had a lot of fear that the State could take them
13 away from me if they found out we were gay. And I didn't know
14 how you could raise kids and not be open, and so I had to work
15 through a lot of that with my counselor before we -- before we
16 ultimately tried to get pregnant.

17 Q By the way, was it the same counselor from when you went
18 before?

19 A It was.

20 Q The same person.

21 A I saw her two weeks ago actually.

22 Q Did you ultimately decide to have children?

23 A We did.

24 Q And without naming their names, do you have children now?

25 A Yes. We have a daughter that's eight and a little boy

1 who's almost four.

2 Q And when your daughter was first born eight years ago, were
3 you worried -- were you and Carla worried about how she would
4 be treated?

5 A We worried about that a lot, so much that we kind of
6 developed a good safe little bubble for her. We had a nanny
7 who came to the house. We didn't try to put her in daycare or
8 go through all of that. We were kind of cautious where we went
9 to eat. We just made sure that anywhere we went we would be
10 safe and she would be safe.

11 Q And what about with respect to her schools?

12 A We shopped for schools a lot. We -- we felt like at the
13 time and even now that there really is only one private school
14 in Jackson that she would be accepted at and our family would
15 be accepted at and unfortunately it is one of the most
16 expensive schools in the state. So we've done without a lot to
17 make sure that she could go there, and she's done well there.
18 It's an Episcopal school.

19 Q Now, you talked about this concept of living in a bubble,
20 Ms. Pritchett. In connection with that, were there places that
21 you and your family avoided?

22 A Yes. Well, even now, if a restaurant has a 50-foot cross
23 in the front yard, we don't go there. There are a lot of
24 places outside of Jackson that we just -- we just don't go
25 because we -- it's -- I almost didn't -- it's almost like our

1 bubble has gotten smaller and smaller in that we know where we
2 feel safe and we know where we don't, and it's almost not been
3 a conscience decision to eat here but not eat there or go to
4 this church but not that church. It's just our community. We
5 know where we're safe, and that's where we stayed.

6 Q Would the same be true with respect to your daughter,
7 particularly now that she's older? Do you have concerns about
8 where she goes and what she does?

9 A We are very cautious where she goes. We've had trouble
10 with summer camps. A lot of the summer camps for kids her age
11 are religious based, and we've had friends who have invited her
12 to religious-based camps, and we ask enough questions that
13 we've never been able to send her to one.

14 So we again pay for a nanny to come sit with her during the
15 summer and do activities with her because we just don't feel
16 safe sending her somewhere where we are not really sure of how
17 everyone will react to her.

18 Q At some point in time, Ms. Pritchett, did you start to
19 think about getting married to Carla?

20 A When [REDACTED] was in kindergarten, she came home. I said her
21 name. When our little girl was in kindergarten, she came home,
22 and she had been studying families. They were studying family
23 units and drawing pictures of families. And she asked if we
24 would married, and we said, No. And she wanted to know why.

25 And we really didn't have a good answer for that

1 immediately, and then we kind of started thinking, well -- at
2 that time six -- I think six or seven states had just come
3 online for us where we could get married in those states
4 legally, and so we decided that [REDACTED] needed to see us get
5 married.

6 And so we went to Maine in 2013 and got married, and we
7 came home and had a big ceremony at home with friends and
8 family and pretty dresses and she was a flower girl so that she
9 could physically see us have a wedding, even though it wasn't
10 really recognized here but she saw us have a wedding.

11 MS. KAPLAN: Your Honor, in keeping with your prior
12 instructions, I'd ask that the name of Ms. Pritchett's daughter
13 be redacted from the record.

14 THE COURT: It will be.

15 BY MS. KAPLAN:

16 Q What do you? How did you -- where did you go to get
17 married?

18 A We went Cape Elizabeth, Maine, to the lighthouse.

19 Q When was that?

20 A 2013.

21 Q And when you came back to Mississippi, did the State of
22 Mississippi treat you as a married couple?

23 A No, no.

24 Q And did that create any problems?

25 A Well, the biggest problem we had was with our taxes. We

1 have businesses. We each had a business, and then we had a
2 joint business for some of the property that we held, and we
3 had to go through a lot of machinations with our accountants to
4 file -- we had to file jointly federally and singly state, and
5 I think that year we paid a fortune to have our taxes done.

6 Q Did there come a time when you became involved in a lawsuit
7 that's now known as CSE I?

8 A Yes.

9 Q And why did you get involved in that lawsuit?

10 A You know, I think there were a multitude of reasons. We
11 wanted to be recognized in our home state for our kids. Their
12 friends families were married, and they didn't -- it was
13 impossible to try to explain to them how you could be married
14 in one state but not married in another state. So we wanted to
15 do it for them.

16 But I think for me personally, I wanted to be -- I wanted
17 to show other young people in Mississippi that you can be a
18 family, you can be gay and be a family and have a successful
19 business and have a career and just live a healthy happy life
20 because I didn't have that growing up, and I wanted to be that
21 for other kids too.

22 Q When you got involved in the CSE I lawsuit as a plaintiff,
23 Ms. Pritchett, were you scared?

24 A We were terrified. We thought -- I thought we would have
25 crosses burning in the front yard when we first got involved.

1 CSE, you know, sat down with us and they said, *We've talked to*
2 *the FBI. We've talked to homeland security. We've been*
3 *through all of these security measures. You're going to be*
4 *safe.*

5 We had to give notice to the kids' schools, both of them,
6 the days of the trial so that we -- so that they could be on
7 high alert because we just really didn't know -- we didn't know
8 how it was going to be received.

9 Q And why were you so scared?

10 MR. BARNES: Your Honor, I apologize.

11 THE COURT: Make sure you are talking into the mic,
12 Mr. Barnes.

13 MR. BARNES: I have to object to the relevance of this
14 entire line of questioning. CSE I was resolved in the
15 plaintiff's favor. They have been married. And we don't see
16 the connection between this testimony and HB 1523.

17 MS. KAPLAN: I think I'll get to the connection very
18 shortly, Your Honor.

19 THE COURT: Okay. Overruled.

20 BY MS. KAPLAN:

21 Q Why were you so scared of becoming a plaintiff in CSE I?

22 A We both grew up in Mississippi in the '70s, and I think we
23 had seen what civil rights activism got for you, and I didn't
24 want to be gunned down in my driveway in front of my kids.

25 Q Did things improve for gay people in Mississippi after you

1 won the case in CSE I?

2 A I think they did. There was kind of a -- there was a huge
3 celebration the night that -- the night that we found out that
4 we had won. And even though -- even though we had to go to the
5 Fifth Circuit and argue again and then even though six or nine
6 months later *Obergefell* came down and there was another huge
7 celebration, but I think people felt vindicated and happy that
8 our community was safe. We felt safer.

9 Q Has that atmosphere of relative safety post *Obergefell*
10 continued?

11 A Well, when HB 1523 was first being discussed in the
12 legislature, I think there was a large change in the
13 community's feeling. We felt like we were being attacked. We
14 felt like we were being pursued, bullied by our own government.
15 The federal government had come in and said we were legal
16 families, and now our own state was saying that it's okay to
17 discriminate against us again.

18 Q And how, if at all, has that affected the way gay people --
19 at least the way gay people you know in Mississippi go by their
20 daily life since HB 1523?

21 A We have friends who don't go out to eat anymore, guy
22 friends from the Delta especially who just don't go out
23 publicly. I think they're -- I think the guys have it a little
24 bit harder than the woman. We have friends with businesses in
25 Fondren who have been harassed by their neighbors. We've seen

1 KKK fliers for the first time in my lifetime. I've never seen
2 one since -- until this bill came out. I think there's just an
3 overall sense that the hatred towards us is escalating, and
4 it's frightening.

5 Q You mentioned KKK fliers. Do you know what those KKK
6 fliers said? Did you see copies?

7 A I've seen some this Belhaven and the Coast, and some were
8 in Laurel not too long ago. They mentioned homosexuality, but
9 they don't mention people specifically and white power and
10 stuff like that.

11 Q And in connection with any children of gay couples in
12 Mississippi, do you know anything that's happened in
13 connection -- happened to them after HB 1523 was passed?

14 A We've had a couple of friends who have had their children
15 bullied at school. One of Carla's -- one of -- I'm not --

16 Q I want you to be careful about --

17 A Not to say names. Right.

18 Q Be careful not to identify any names.

19 A One of my daughter's friends goes to a different school,
20 and her parents call me crying one night saying she had been
21 bullied at school, and she and [REDACTED] discussed that. They --
22 the children were bullying here because she had gay parents.

23 MS. KAPLAN: Again, Your Honor, I'd ask that we redact
24 copies of the name. Your Honor, may I approach the witness to
25 hand her a copy of the complaint?

1 THE COURT: You may.

2 BY MS. KAPLAN:

3 Q Ms. Pritchett, I've handed you a copy of the complaint in
4 this matter, and I've directed your attention to paragraph 75.
5 You'll see that there's some language there highlighted in
6 yellow. Could you please read that into the record.

7 A "Just weeks after the law was enacted, a Mississippi public
8 schoolteacher accepted her government's invitation to promote a
9 preferred religious beliefs at the expense of LGBT
10 Mississippians and their family members by verbally assaulting
11 her six year old" -- "by verbally assaulting her six year old
12 for being the daughter of lesbian parents." I'm sorry. Give
13 me just a second.

14 "According to the girl's mother, the teacher told their
15 daughter that her parents weren't really married because a
16 marriage can only be between a man and a woman. The teacher
17 then proceeded to humiliate the little girl by polling the
18 other children in the class to show that they all had a mother
19 and a father and demonstrate that her parents were different."

20 Q Do you know the people who are referenced in that passage
21 you just read?

22 A I do.

23 Q Without identifying any names, how do you know them?

24 A We met them soon after *Obergefell* came down.

25 Q And do you know why their names are not mentioned in that

1 complaint?

2 A Because they are terrified. I talked to them last night.
3 They are terrified of being public. And they feel guilty for
4 not being here to testify, but they finally just decided they
5 couldn't put a target on their little girl's back.

6 Q Ms. Pritchett, do you have any reason to believe that the
7 events described in that paragraph did not happen?

8 A I know that they happened.

9 Q How did -- hearing that story from your friends, how did
10 that make you feel?

11 A Afraid for my kids, afraid for my friends' kids. They
12 posted it on Facebook the morning after it happened when she --
13 when she came home from school and told them, and the outcry
14 was just so immense that they had to take the post down.

15 THE COURT: I'm sorry. "They" being the parents of
16 the child?

17 THE WITNESS: The mothers, yes. The mothers of the
18 little girl.

19 BY MS. KAPLAN:

20 Q Ms. Pritchett, God willing, where will you and your family
21 be living this same time next year?

22 A Tampa, Florida.

23 Q And why is that?

24 A Because I don't want that to happen to my little girl. We
25 just finally decided that we have to get them out of here and

1 get them somewhere that's safer to be.

2 Q And did HB 1523 have anything to do with that decision,
3 Ms. Pritchett?

4 A I think it was the final straw. We felt like we were safe
5 and okay. But then when this came out, it just felt like the
6 State will never stop pursuing us. We just need to be
7 somewhere where we can be safe.

8 Q Thank you, Mr. Pritchett, and thank you for your bravery in
9 giving that testimony.

10 MR. BARNES: No questions, Your Honor.

11 THE COURT: All right. Thank you, Ms. Pritchett.
12 That concludes, I believe, the testimony for today. I
13 understand that there will be one witness tomorrow. I would
14 like to begin at 8:30 or 9:00. What's the preference of the
15 parties? Originally we had said 9:30 and that's not the case.

16 MS. KAPLAN: I'm an early riser, Your Honor, so
17 whatever --

18 THE COURT: You are on the New York time?

19 MS. KAPLAN: Exactly.

20 THE COURT: All right.

21 MR. BARNES: Whatever time is most convenient for the
22 court. 8:30 is fine, Your Honor.

23 MR. McDUFF: That's my preference.

24 MS. KAPLAN: We'd appreciated that, Your Honor,
25 because there's a 6:30 plane that we have to catch.

1 THE COURT: Oh, you will.

2 MS. KAPLAN: Or we're going to spend some more money
3 here.

4 THE COURT: You will catch a 6:30 plane.

5 MR. BARNES: We appreciate that from this side also,
6 Your Honor.

7 THE COURT: Okay. We'll start up tomorrow morning at
8 8:30. Thank you all for your attention, and court's adjourned.

9 (Recess)

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CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 27th day of June, 2016.

s/ *Cherie G. Bond*
Cherie G. Bond
Court Reporter

B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

RIMS BARBER, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00417-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

AND

CAMPAIGN FOR SOUTHERN EQUALITY, ET AL. PLAINTIFFS

VS. CIVIL NO. 3:16-cv-00442-CWR-LRA

PHIL BRYANT, ET AL. DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION

VOLUME 2 of 2

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
JUNE 24, 2016
JACKSON, MISSISSIPPI

REPORTED BY: CHERIE GALLASPY BOND
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FOR THE DEFENDANTS BRYANT AND DAVIS :

MR. TOMMY D. GOODWIN

TABLE OF CONTENTS

VOLUME 2

WITNESS FOR THE CSE PLAINTIFFS

ROBERT JONES 214

Direct Examination By Mr. Kaye215

Cross-Examination By Mr. Barnes234

Redirect Examination By Mr. Kaye247

Examination By The Court250

Exhibit CSE-2, CSE-5, CSE-6, CSE-7,253

CSE-8 and CSE-9

Exhibit CSE-3 and CSE-4255

ARGUMENTS

Argument by Ms. Kaplan258

Argument by Mr. McDuff290

Argument by Mr. Barnes310

Argument by Mr. Miracle340

Argument by Mr. Goodwin352

Rebuttal Argument by Ms. Kaplan360

Rebuttal Argument by Mr. McDuff371

Court Takes Case Under Advisement375

1 (Court Called to Order)

2 THE CLERK: Before the court this morning is cases
3 styled and numbered *Rims Barber v. Governor Phil Bryant*, civil
4 action number 3:16CV417CWR-LRA and *Campaign for Southern*
5 *Equality v. Phil Bryant*, civil action number 3:16CV442CWR-LRA.

6 THE COURT: Good morning. Are there any housekeeping
7 matters we need to take care of before we begin? All right.
8 Plaintiff may call the next witness.

9 MR. KAYE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. KAYE: Plaintiffs call Dr. Robert Jones.

12 (Witness Sworn)

13 THE COURT: Dr. Jones, before we begin, before you is
14 the microphone. You don't have to speak directly into it.
15 Please speak loudly and clearly enough for the court reporter
16 to hear you. Also speak at a pace at which she can keep up
17 with you. Allow the lawyers to finish their questions before
18 you begin to answer so that the two of you won't be speaking at
19 same time. And make sure all your responses are verbal, and
20 try to avoid using uh-huh or unh-unh because they look the same
21 on a piece of paper.

22 THE WITNESS: Yes, sir.

23 THE COURT: All right.

24 ROBERT JONES,

25 Having first been duly sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MR. KAYE:

3 Q Good morning. Would you state your name for the record,
4 please.

5 A Robert Patrick Jones.

6 Q Okay. And, Dr. Jones, what is your profession?

7 A I'm the CEO of Public Religion Research Institute, also
8 known as PRRI.

9 Q What is PRRI?

10 A We are a nonprofit, nonpartisan independent research
11 organization that specializes in research at the intersection
12 of religion, values, and public life.

13 Q How long have you been the CEO?

14 A Since its founding in 2009.

15 Q And what did you do professionally before founding PRRI?

16 A So I worked as a professor, Assistant Professor of
17 Religious Studies at Missouri State University, as a consultant
18 at a number of think tanks in Washington, D.C., before founding
19 PRRI in 2009.

20 Q And will you describe your educational background.

21 A Yes. I have a Ph.D. in religion from Emory University, I
22 have a master of divinity degree from Southwestern Baptist
23 Theological Seminar in Fort Worth, Texas, and a bachelor of
24 science in mathematics from Mississippi College.

25 Q You have been honored in any way by your alma maters?

1 A Yes. In 2013, I was named the alumnus of the year by the
2 graduate division of religion at Emory University, and this
3 year I have just been told I've been named an alumnus of the
4 year for the mathematics department at Mississippi College.

5 MR. KAYE: Your Honor, may I approach?

6 THE COURT: Yes, you may.

7 BY MR. KAYE:

8 Q Dr. Jones, I've just handed you what's been marked as
9 Plaintiffs' Exhibit CSE Exhibit 26. Do you recognize that
10 document?

11 A Yes. It is my CV.

12 Q Thank you. You can set that aside. Now, your Ph.D. is in
13 the field of religion. What is that field exactly?

14 A So that field can be a number of things. In my case, at
15 Emory University my areas of specialization were in sociology
16 of religion, political theory, and Christian theology.

17 Q And what are some of the methods that you relied on in your
18 academic training?

19 A So both quantitative and qualitative methods. So I had
20 training both in quantitative data analyses and also in methods
21 like ethnographic interviewing for interviewing subjects.

22 Q Okay. And what do you personally study as a scholar of
23 religion?

24 A So as a scholar of religion, particularly with my role at
25 PRRI, we study public opinion and particularly this

1 intersection between religious belief and behavior and
2 affiliation, on the one hand, and how that impacts people's
3 beliefs on a whole range of public policy issues.

4 Q And at PRRI specifically, what does your work there consist
5 of?

6 A Yeah. So I am the principal researcher on all of our
7 public opinion research projects that we do. And we cover a
8 whole range of issues from climate change to immigration to
9 LGBT issues and a number of other issues as well.

10 Q And on those public opinion research projects, how do you
11 conduct those?

12 A So one of the things that we -- on our public opinion
13 research project, PRRI has been very careful from the beginning
14 because I come out of the academic world to follow all of the
15 top-shelf academic standards in all our work. So we only
16 conduct random probability samples, for example, which is the
17 highest quality of public opinion research. We -- in our
18 telephone interviewing, we conduct half -- last year we
19 conducted half of our interviews with cell phones, half of them
20 with land lines. Again, that's again the top-quality
21 academic methodology.

22 Q Slow down just a little bit.

23 THE COURT: Are you from Mississippi?

24 THE WITNESS: I am from Mississippi.

25 THE COURT: Okay. You are speaking kind of fast.

1 A I will slow down. Okay. The result of sort of being in
2 D.C. and giving sound bites, but I will slow down. Yes. Yeah,
3 so backing up so our telephone surveys are conducted 50 percent
4 cell phone, 50 percent land line. That is the very high
5 standard that has to do with a number of people not having land
6 lines any longer. So in order to get a representative sample,
7 you have to now do a lot of cell phone interviewing. Random
8 probability samples, cell phone interviewing, all our surveys
9 are actually conducted in Spanish and English, bilingual
10 interviewing as well.

11 BY MR. KAYE:

12 Q Now, is PRRI affiliated with any credentialing
13 organizations in the field of public policy research, public
14 polling?

15 A Yes. One of the challenges, I think, with public opinion
16 polling is that there have been a proliferation of polls over
17 the last decade. So what has happened is there have become
18 credentialing organizations to help sort out which public
19 opinions polls have credible findings, which ones may not.

20 So PRRI is a member of the largest credentialing
21 organizations. So one of the oldest ones is the National
22 Council on Public Polls. There are less than 40 public opinion
23 organizations that have met the criteria to be a member of the
24 National Council of Public Polls, which was founded in 1969 as
25 a way of fostering transparency and rigor in the field of

1 public opinion research.

2 The other organization that we are a member of is the
3 American Association of Public Opinion Research, also known as
4 AAPOR. This is the largest guild representing public opinion
5 pollsters in the country. PRRI is a charter member of this
6 initiative called The Transparency Initiative, which was an
7 initiative designed to set up a set of guidelines to make sure
8 that pollsters who are producing data for public consumption
9 were meeting not only ethical criteria but transparency
10 criteria such as making our entire questionnaire available for
11 public use, being very transparent about our methodology. All
12 of our reports have a very long methodological statement so you
13 can see how we created our sample, who we called, the margin of
14 sampling error --

15 THE COURT REPORTER: Stop. I lost you.

16 Q We can move on from this.

17 THE COURT: You could take a breath between
18 statements.

19 BY MR. KAYE:

20 Q Dr. Jones, will you slowly tell the court if you are a
21 member of any professional organizations yourself.

22 A Yes. So I myself am a member of AAPOR, this organization
23 that I just mentioned. I am also the national cochair of the
24 Religion and Politics Section at the American Academy of
25 Religion, which is the largest guild of academics who study

1 religion in the world, actually.

2 I also sit on the editorial board of the journal for that
3 organization, the *Journal of the American Academy Of Religion*.
4 I am also a member of the editorial board for the journal
5 *Religion and Politics*, which is published by Cambridge
6 University Press for the American Political Science
7 Association.

8 Q Okay. Dr. Jones, have you published any books on the
9 specific topic of religion, politics, and public opinion?

10 A Yes. I've published three books.

11 Q What are those books called?

12 A The first book was called *Liberalism's Troubled Search for*
13 *Equality* in 2007. The second book was called *Progressive and*
14 *Religion* in 2008. And a current book that is forthcoming in
15 just a few weeks on July 12th is entitled *The End of White*
16 *Christian America*. The first book was published by the
17 University of Notre Dame Press. The second by book Rowman &
18 Littlefield, and the third book by Simon & Schuster.

19 Q Have you published any articles or book chapters on these
20 subjects?

21 A Yes. I've published 13 academic articles or book chapters.

22 Q Okay. Have you ever served as an expert witness?

23 A No.

24 Q Are you being paid for your services today?

25 A No.

1 Q Are you being reimbursed for your travel expenses?

2 A Yes.

3 Q Okay.

4 MR. KAYE: Your Honor, I offer Dr. Jones as an expert
5 in the field of religion and public opinion.

6 THE COURT: Any objection from --

7 MR. BARNES: No objection.

8 THE COURT: This witness will be deemed an expert in
9 the field of religion and public opinion.

10 MR. KAYE: Thank you, Your Honor.

11 BY MR. KAYE:

12 Q Dr. Jones, what have you been asked here today to offer
13 your expert opinion on?

14 A To generally talk about the relationship between religious
15 belief, behavior and affiliation, and attitudes on same-sex
16 marriage and other related issues around LGBT equality.

17 Q And has PRRI published any reports on those issues
18 recently?

19 A Yes. Earlier this year we published a major report looking
20 at national attitudes around three specific issues, attitudes
21 towards same-sex marriage, attitudes toward LGBT
22 nondiscrimination laws, and attitudes toward religiously based
23 service refusals around these laws.

24 MR. KAYE: Your Honor, may I approach?

25 THE COURT: Yes, you may.

1 BY MR. KAYE:

2 Q Dr. Jones, I've just handed you all of my copies of that
3 exhibit.

4 THE CLERK: You can have this one back.

5 BY MR. KAYE:

6 Q I just handed you what's been marked as CSE Exhibit 14. Do
7 you recognize this document?

8 A I do. This is the major report that I just mentioned.

9 Q Okay. And what subjects does this report cover?

10 A This covers -- this report covers attitudes on same-sex
11 marriage, LGBT nondiscrimination laws, and religiously based
12 service refusals and breaks down attitudes by religious
13 affiliation and belief.

14 Q And why did you choose those subjects to put together in
15 this report?

16 A Well, one of the reasons for PRRI's existence is to study
17 attitudes that are at the forefront of cultural debate and
18 change in the country. And these three issues are -- as we are
19 seeing in the court today, demonstrate or are issues that are
20 really up for debate in today's culture.

21 Q Could you just speak for a moment about the methodology
22 that's reflected in this particular report?

23 A Well, one of the remarkable things about this study is, to
24 my knowledge, it's one of the largest studies ever conducted on
25 these issues. We interviewed more than 42,000 Americans in a

1 random probability sample. Now, to put that in perspective for
2 you, your typical political survey that you may read from the
3 *Washington Post* or in the news has 1,000 interviewees. This
4 survey is more than 40 times as large as most public opinion
5 surveys that you see in the public. This gives us a high
6 degree of confidence in the results.

7 Q I'd like to turn to the report's findings on opinions about
8 same-sex marriage and direct you -- direct you to page 6 of
9 this report. What does the table on this page show?

10 A The table on this page shows views on same-sex marriage by
11 religious affiliation.

12 Q And what in particular stands out to you about this?

13 A Well, what we see in the country is overall 53 percent of
14 Americans support same-sex marriage, 37 percent oppose. And we
15 see a wide range of difference of opinion among religious
16 groups. So religious affiliation in short matters on this
17 topic.

18 Q And in terms of religious groups that are most opposed to
19 marriage between same-sex couples --

20 A Yep.

21 Q -- what did you find?

22 A So in particular in our survey, other surveys, for quite a
23 while now, we have seen a very steady pattern that there are
24 basically two major groups that stand out on this issue. So
25 white evangelical protestants among whom two thirds,

1 67 percent, oppose same-sex marriage, and the other group that
2 looks nearly identical are Mormons, among whom 67 percent
3 oppose same-sex marriage. These groups stand out as like the
4 two most opposed --

5 THE COURT: Slow down just a little bit. You've got a
6 bunch of reporters in here, and they are going to want to write
7 down there too. But slow down for the court reporter.

8 BY MR. KAYE:

9 Q And you said that opinion maps to really -- what do you
10 mean by that?

11 A So there's a high degree of correlation between religious
12 affiliation and attitudes on same-sex marriage.

13 Q Okay. And on the other end, what religious groups are most
14 in favor of marriage between same-sex couples?

15 A We do see a number of religious groups. It general what we
16 see is this nonChristian religious groups that have the highest
17 levels of support for same-sex marriage. For example:

18 Jewish Americans: 76 percent favor same-sex marriage.

19 Buddhists: 85 percent favor same-sex marriage.

20 Hindus: 66 percent favor.

21 And among the one that maybe stands out the most are
22 Unitarian Universalists, among whom 96 percent favor same-sex
23 marriage.

24 Q Okay. Now, what about religiously unaffiliated Americans?

25 A Religiously unaffiliated Americans also stand out for being

1 strongly in favor of same-sex marriage. So approximately eight
2 in ten, 78 percent, of religiously unaffiliated Americans say
3 they favor same-sex marriage. Less than one in five oppose.

4 Q And what does it mean when you say "religiously
5 unaffiliated Americans"?

6 A So these are people in public opinion surveys -- and I
7 should say that our religious identification question mirrors
8 Pew and -- Pew's question and is a pretty standard way of
9 understanding religious affiliation in political science and
10 sociologies circles.

11 But the basic definition on public opinion surveys when we
12 ask, *What is your religion? Are you Protestant, Catholic,*
13 *Jewish, et cetera,* these are people who say, *Nothing in*
14 *particular* so they claim no religious affiliation or they say
15 they are atheist or agnostic in the answer to that question.

16 Q A few moments ago you mentioned white evangelical
17 protestants.

18 A Yep.

19 Q What does that mean?

20 A Again, this is a self-edification measure on public opinion
21 surveys. It is -- in order to be categorized as a white
22 evangelical Protestant, you would identify as white, as
23 nonHispanic, as Christian, as Protestant and would also
24 identify as evangelical or born-again Christian.

25 Q Are there any denominations that are well known that fall

1 into that category?

2 A Sure. And certainly here in Mississippi the largest one
3 would be the Southern Baptist Convention. Also a large number
4 of nondenominational Protestant churches would fit this
5 definition as well.

6 Q And the data you have just been sharing with the court is
7 national data. Right?

8 A That's right.

9 Q How does that data compare to the data here in Mississippi?

10 A Well, one thing to say about Mississippi, of course, is
11 that it's fairly unique state, unique state in terms of its
12 religious demography. So, for example, it is tied with Alabama
13 as the state that has the fewest nonreligious people in the
14 state. So only about 13 percent of Mississippians claim no
15 religious affiliation whatsoever. Eighty percent of the state
16 identifies as Christian and perhaps most interestingly three in
17 ten Mississippians identify as one particular type of Christian
18 and that is white evangelical Protestant.

19 Q Now, generally speaking, do views of adherence to a
20 particular religion or sect correspond to their views on
21 marriage between same-sex couples?

22 A Generally -- you mean in terms of the official position of
23 the institutional form of the religion?

24 Q Exactly.

25 A So generally speaking, yes, with one particular notable

1 exception, and that is Roman Catholics. So what we find in the
2 data is actually a division between the official Catholic
3 position, which is, of course, in opposition to the
4 legalization of same-sex marriage and the public opinion of
5 rank and file Catholics when we ask them in public opinion
6 surveys among whom about six in ten actually favor same-sex
7 marriage.

8 Q How do you explain that discrepancy?

9 A Well, it's interesting. One of the things that we know
10 about Catholics is that for Catholics, religious identity is
11 more complex, I think, than for Protestants. It is about not
12 only belief, but it is also about a kind of ethnic identity in
13 many cases of being Polish and Irish and identifying as
14 Catholic is part of that.

15 The other thing that we see in the data is that those --
16 Catholics -- this is true for most religions, but Catholics who
17 attend religious services more than once a week are much more
18 likely to be aligned with the official church position than
19 those who maybe have a more ethnic identification and attend
20 religious services fewer. So it is 48 percent of Catholics who
21 attend weekly or more favor same-sex marriage. When you look
22 at all of those two attend far less frequency -- less
23 frequently, the number is two thirds support same-sex marriage.

24 Q Okay. Now, in addition to the study that we're talking
25 about from PRRI, are there other similar studies that

1 corroborate your findings?

2 A Yes. This question of same-sex marriage is one that has
3 been polled a lot. So if you look at data from the Pew
4 Research Center, for example, one of the longest trend lines
5 there, the data looks very, very similar to the religious
6 breaks that I've just been giving.

7 Q Okay.

8 MR. KAYE: I've just handed the witness document that
9 have been marked as Exhibit D-2 and D-3. I believe the court
10 already has copies?

11 THE COURT: Yes.

12 MR. KAYE: Okay. Thank you.

13 BY MR. KAYE:

14 Q Dr. Jones, do you recognize these documents?

15 A I do.

16 Q And what are they?

17 A This -- these are reports generated from the Pew Research
18 Center's Religion in America Religious Landscape Survey in
19 2014.

20 Q And generally speaking, do these -- do the -- does the data
21 here corroborate, in your view, the data in the PRRI study?

22 A Yes, to an exceptional degree. This survey was also
23 conducted with a very large sample size of 35,000 Americans.
24 It was conducted a year prior to the PRRI data. But just to
25 give you a couple of examples, the Pew Research Center finds

1 53 percent of Americans in that study support same-sex
2 marriage; the PRRI study finds 53 percent of Americans support
3 same-sex marriage.

4 If we look at white evangelical Protestants, just to give
5 you one more number, 28 percent in the Pew study favor same-sex
6 marriage; and in the PRRI study, 26 percent favor same-sex
7 marriage.

8 Q I'm going to show you --

9 MR. KAYE: Your Honor, may I approach?

10 THE COURT: Yes, you may.

11 BY MR. KAYE:

12 Q Do you recognize this document?

13 A I do.

14 Q What is this?

15 A This is a 2016 report for the Pew Research Center showing
16 basically steady support for same-sex marriage over time.

17 Q And how does this correspond to the data in your -- the
18 PRRI report?

19 A Well, as the headline of the report indicates, it indicates
20 that the data have not moved significantly in any way and
21 basically corroborate the other two studies.

22 Q You can set this document aside. Now, turning back to your
23 study, I'd like to direct your attention to page 12. For the
24 record, we're back to CSE-14. And what does the table on this
25 page show?

1 A So this table is Views on LGBT Nondiscrimination Laws by
2 Religious Affiliation.

3 Q What are the groups that are most opposed to
4 nondiscrimination laws?

5 A We again see a similar pattern here with white evangelical
6 Protestants being most opposed on this law. However, even
7 though they are sort of least in favor, 57 percent of them
8 actually favor nondiscrimination laws.

9 Q On the other end, the religious groups that are most in
10 favor of these laws?

11 A Religious groups most in favor, again similar pattern.
12 Hindus, Buddhists, Jews, Unitarian Universalists and then all
13 the religiously unaffiliated at eight in ten, 81 percent, in
14 favor of nondiscrimination laws.

15 Q I'd like to direct your attention to page 16.

16 THE COURT: I just want to make sure I've heard the
17 question right and the response with respect to page 12.

18 MR. KAYE: Yes.

19 THE COURT: Views on LGBT nondiscrimination laws by
20 religious affiliation, and the question posed to those people.
21 "Do you favor or oppose laws that would protect gay, lesbian,
22 bisexual, and transgender people against discrimination in
23 jobs, public accommodation and housing?" Now, what is your
24 question as it relates to that specific question because that's
25 the chart. I just want to make sure.

1 MR. KAYE: Yeah. Let me clarify, Your Honor. Thank
2 you.

3 BY MR. KAYE:

4 Q To that specific question that the court just read, the
5 groups that were most in favor -- the groups that were most
6 opposed to that type of law that protects against
7 discrimination, those groups are?

8 A Those groups are white evangelical Protestants for the most
9 part. Interestingly enough, Mormons are not as opposed on this
10 particular question.

11 Q And the religious groups that are most in favor of that
12 type of law that protects against discrimination?

13 A Yes, Unitarian Universalist, Jews, Buddhists, Hindus, and
14 here actually Muslims also two thirds support.

15 Q Okay. And religiously unaffiliated?

16 A 81 percent in favor, only 16 percent opposed.

17 Q Now, I'd like to move on to the question of, "Do you favor
18 or oppose allowing a small business owner in your state to
19 refuse to provide products or services to gay or lesbian people
20 if doing so violates their religious belief?"

21 What did your -- first let me ask, the report actually
22 phrases that as -- if you look at page 15, the headline is,
23 "Most Americans oppose allowing businesses to refuse services
24 to LGBT people." So how is the question phrased in this study?

25 A Yes, let me clarify. So the exact wording of the question

1 is: "Do you favor or oppose allowing a small business owner in
2 your state to refuse to provide products or services to gay and
3 lesbian people if doing so violates their religious beliefs?"

4 Q Okay. And what did your study find in terms of those who
5 support that kind of question based on religious affiliation?

6 A We found a similar pattern to same-sex marriage with one
7 exemption, but generally speaking we found again Unitarian
8 Universalists, Jewish Americans, Buddhists, and Muslims and
9 Hindus strongly opposing this law. We also found interestingly
10 enough on this particular question while African-American
11 Protestants only about four in ten support same-sex marriage,
12 we found two thirds of African-American Protestants actually
13 opposed religiously based service refusals on this question.

14 Q Thank you. And religiously unaffiliated people: Where do
15 they come in?

16 A The religiously unaffiliated, 71 percent of them oppose
17 allowing religiously based service refusals; 25 percent
18 support.

19 Q Dr. Jones, in light of the statistics we have just
20 discussed and your years of study in the field of religion and
21 politics, how would you characterize the percentage of
22 Americans who are religiously unaffiliated who hold the moral
23 conviction as opposed to a religious belief that gay and
24 lesbian couples should not be permitted to marry?

25 A Well, what we see is less than one in five. I think the

1 standard question on do you favor same-sex marriage or not is
2 maybe the best answer to this question. Less than one in five,
3 17 percent oppose same-sex marriage. That's a very small
4 minority. I would say overwhelming majorities of religiously
5 unaffiliated Americans support same-sex marriage.

6 Q Okay. And how you would characterize the percentage of
7 Americans who are religiously unaffiliated who hold the moral
8 conviction as opposed to the religious belief that LGBT people
9 should not get protection against discrimination?

10 A Again, the religiously unaffiliated are very consistent on
11 these questions. About eight in ten say that they favor
12 nondiscrimination laws to protect LGBT people.

13 Q And how would you characterize the percentage of Americans
14 who are religiously unaffiliated who hold the moral conviction
15 as opposed to the religious belief that small business owners
16 should be able to refuse service to people just because they
17 are gay, lesbian, bisexual, or transgender?

18 A Again 71 percent oppose. That's overwhelming opposition.

19 MR. KAYE: No more questions at that time, Your Honor.

20 THE COURT: Okay. Thank you. Before
21 cross-examination, Mr. McDuff, do you have any questions for
22 this witness?

23 MR. McDUFF: I do not, Your Honor.

24 THE COURT: All right.

25 MR. BARNES: May I proceed?

1 THE COURT: Yes, you may.

2 CROSS-EXAMINATION

3 BY MR. BARNES:

4 Q Good morning, Dr. Jones.

5 A Good morning.

6 Q My name is Paul Barnes, and I will say that as a
7 Mississippian who's been accused by court reporters as speaking
8 too fast, we are in the same group. And at least I speak a
9 little slower than some of the lawyers in the room. But I
10 still -- I know she will catch -- she will point to me if I
11 start talking too fast. I know Judge Reeves will catch me.

12 But let's talk about -- a little more about the Pew
13 Research Center and your organization. They are very similar
14 in the type of work that you do. And again I believe my
15 question was that your group and entity, your institution and
16 the Pew Research, are very similar in what you do. Correct?

17 A Correct. In fact, our director of research used to work at
18 the Pew Research Center.

19 Q And so you agree that Pew Research is also well respected
20 and nonbiased?

21 A Absolutely.

22 Q And I apologize that I may skip around a little bit.

23 A Sure.

24 Q But normally when we have to cross-examine an expert
25 witness, we would have a report and I would have kind of a

1 guide to go by, but I'm on the fly a little bit. So I
2 apologize if I jump around. I want to ask you on exhibit
3 CSE-14, I'd like to go back to page 4, if you don't mind.

4 A 14. All right. That's the PRRI report. Correct?

5 Q Yes. I'm sorry. Yes, your report.

6 A Yes.

7 Q What page?

8 A Page 6.

9 Q It's the table of views on same-sex marriage by religious
10 affiliation. I notice you skipped over a number of groups when
11 you were outlining the before. So I wanted to ask you about
12 that. I didn't hear you mention Jehovah's Witnesses.

13 A Uh-huh.

14 Q But they strongly oppose same-sex marriage. Correct?

15 A That's correct. Yes, 72 percent.

16 Q And as I read this data, the Jehovah's Witnesses are the
17 most opposed to same-sex marriage.

18 A Let's see. Yes, that's true. They are within 5 percentage
19 points of the white evangelical Protestants. Yes, 72 percent
20 versus 67 percent.

21 Q Muslims. I didn't hear you talk about the Muslim faith. A
22 majority of Muslims oppose same-sex marriage. Correct?

23 A No, that's incorrect. And plurality of Muslims oppose
24 same-sex marriage. It's only 45 percent who oppose and
25 41 percent who favor.

1 Q And I apologize. The only course I ever took in statistics
2 was like long time ago, and it was very basic. But I
3 understand your point.

4 A If we get to 51 percent, we can say majority.

5 Q So not a majority, but more Muslims reported that they
6 opposed same-sex marriage than reported that they favored it.

7 A Correct.

8 Q Is that accurate?

9 A That's accurate.

10 Q Okay. I want to ask you a question about white mainline
11 Protestant.

12 A Uh-huh.

13 Q I believe I understand that designation as it's used in the
14 research, but I want to make sure. Mainline -- mainline
15 Protestant denominations are those like Methodist, Episcopal,
16 Presbyterian?

17 A Yes, sir.

18 Q Correct? That at one time were the majority of the
19 Protestant denominations.

20 A That's correct. Yes, they were in -- certainly the most
21 prominent visible part of the white Protestant world.

22 Q But at some point in the mid Twentieth Century, they
23 actually became less than a majority of the Protestant faith.

24 A That's correct. Their numbers began to decline in the
25 1960s, and that decline continued through the 1990s when it

1 began to plateau. But there was a precipitous decline between
2 the 1960s and the 1990s, that group.

3 Q And back to the chart -- and I apologize again for skipping
4 around. But I don't believe you mentioned black Protestant
5 views --

6 A Uh-huh.

7 Q -- or Hispanic Protestant views or other nonwhite
8 Protestant views. So I know you didn't mean to skip that, but
9 a majority of black Protestants oppose same-sex marriage.

10 Correct?

11 A That's correct. 54 percent oppose.

12 Q A majority of Hispanic Protestant -- a strong majority
13 oppose.

14 A That's correct, 59 percent.

15 Q Other nonwhite Protestants -- not a majority but
16 38 percent report favor, favoring same-sex marriage;
17 48 percent's oppose -- so a plurality -- is that the right
18 term --

19 A That's right.

20 Q -- opposes same-sex marriage.

21 A Yes, sir.

22 Q And then also you've got the Catholic faith broken down
23 into white Catholic, Hispanic Catholic, other nonwhite
24 Catholic. But it looks to me like the numbers are fairly
25 similar.

1 A They are. Those differences are not statistically
2 different from one another, yes.

3 Q So not statistically significant.

4 A In their differences, yes.

5 Q Within the margin of error.

6 A Yes.

7 Q And you were asked about the Catholic faith specifically
8 because of the dichotomy between the official position or
9 doctrine of the church and the opinions reported by the
10 adherence. Correct?

11 A Yes.

12 Q Do you recall that? And you do agree it is the official
13 doctrine of the Catholic Church that same-sex marriage is
14 wrong. It is a sin.

15 A That's correct. That's the official position of the
16 church.

17 Q And the Catholic church is a hierarchal -- I can't
18 pronounce it. I apologize. The Pope is the head of the
19 church.

20 A Correct.

21 Q And everybody below the Pope is supposed to follow the
22 Pope.

23 A Correct.

24 Q As opposed to nonhierarchal denominations such as most of
25 the Protestant denominations. They don't have a Pope. It's

1 much more a individualized belief or groups can form their own
2 beliefs. Is that fair? A bad question?

3 A Not exactly. Among Protestant groups, as you probably
4 know, it is very, very complex. Some Protestant denominations
5 have more binding positions on their clergy, for example, on
6 this issue, and other denominations have less binding. But,
7 for example, the United Methodist Church has a binding position
8 on this, and clergy who violate the position, for example, by
9 officiating at a same-sex couple's wedding ceremony can be
10 disciplined by the church.

11 Q Thank you. And I asked a very poor question, and I admit
12 that -- my personal experience is limited. I'm a Southern
13 Baptist too. But the Catholics -- and I don't want to
14 characterize the Catholics that favor same-sex marriage versus
15 those who do not. But you said there was a correlation between
16 Catholics who attend church regularly tend to oppose same-sex
17 marriage; those who favor same-sex marriage tend to not attend
18 as regularly. Correct?

19 A Right. So among those who attend weekly or more, only
20 48 percent favor same-sex marriage. But if you look at those
21 who attend monthly or less, two thirds favor same-sex marriage.
22 So clear division by church attendance.

23 Q Would you agree with me that in none of the faiths depicted
24 or where there's data concerning groups in this chart on page
25 6, is there a unanimous position? Universal -- Unitarian

1 Universalist is near unanimous. Correct?

2 A That's correct. 96 percent is near unanimous. It is
3 correct -- I would say in public opinion research, anything
4 that runs like seven in ten or more is generally overwhelming
5 support. Never have I seen unanimous on a public opinion
6 research survey.

7 Q I understand. Thank you. We already covered the Methodist
8 distinction so I appreciate that. I would like to ask you --
9 strike that. Do you already have exhibit -- I think you have
10 Exhibit D-3 in front of you, which is the Pew Research Center.

11 A Let's see. I have D-2.

12 Q Let's use D-2 because it's got both the -- obviously the
13 numerical tables and in the back it has the bar graphs.

14 A Yes.

15 Q Do you have a copy of D-4?

16 A I do not. I have D-2 and D-3, which are the bar graphs.

17 Q Bar graphs in D-2 are toward the back. If you look in the
18 bottom right-hand corner, there's some numbers that say D-2-21.
19 I apologize. Those were supposed to make it more helpful to
20 find.

21 A I have D-2 and I have D-3 things on the back of that.

22 Q Right. Exactly.

23 A Okay.

24 Q But it's just the graphs from D-3, not all of the other
25 explanatory materials. All right. I'd like to give you D-4.

1 MR. BARNES: Your Honor, may I approach?

2 THE COURT: Yes, you may.

3 MR. BARNES: The court has a copy?

4 THE COURT: Yes.

5 BY MR. BARNES:

6 Q And this is -- appears to be a little bit more detailed
7 information similar to or perhaps the basis of the chart on
8 page 6.

9 A This is data from 2014 so it is from the same study but
10 from a year earlier.

11 Q Okay. And on D-4, I guess what I was most interested in
12 was there's a lot more detailed breakdown concerning the
13 various denominations where they strongly favor or -- simply
14 favor same-sex marriage, et cetera. I notice that the Jewish
15 faiths you do not break that down.

16 A It's in there. It is 1, 2, 3, 4, 5, 6 from the bottom.

17 Q What I meant to say was aren't there more -- isn't this
18 more than one Jewish faith or a type of Judaism?

19 A Oh, I see what you mean. Yes. But the sample size did not
20 permit us to break those numbers down any further.

21 Q But don't you agree with me that the group -- as I
22 understand it, it's an umbrella term. The term Orthodox
23 Judaism is an umbrella term, as Rabbi Simons told us yesterday.
24 I don't know if you were privy to that, by Rabbi Simons told us
25 that was an umbrella term. But do you agree that many of the

1 groups that identify as orthodox Jews oppose same-sex marriage?

2 A I don't have any data to speak to that.

3 Q Let's look at D-2.

4 A Okay. D-2. Yes.

5 Q I have to say it looks like Pew Research kind of covered
6 the field to some extent on some of their -- on what type of
7 beliefs might have an impact on views on same-sex marriage such
8 as frequency of meditation, feelings of spiritual peace and
9 well-being. Frequency of feeling wonder about the universe is
10 kind of -- was an interesting one to me. But I would like to
11 start with -- it's page 10 of 2014, it says at the top, at
12 bottom D-2.10.

13 A .10. Yes.

14 Q And so would you agree with me that this is a chart based
15 on the number of adults who say they identify what they look to
16 most for guidance on right and wrong? And specifically in the
17 context of same-sex marriage. Correct?

18 A Correct.

19 Q And so for those who strongly favor same-sex marriage, only
20 17 percent say that religion is the strongest influence on
21 their belief.

22 A That is correct.

23 Q That's what the data report.

24 A That's what the data says in the table, yes.

25 Q 15 percent cite philosophy or reason, 53 percent report

1 common sense, 13 percent report science, and 2 percent reported
2 that they don't know. Do you have any data that contradicts or
3 disagrees with this?

4 A We have not asked this question. The reason we have not
5 asked this question this way is because I think these
6 categories are actually a little muddy. So, for example, if
7 you're about to answer a telephone survey and you're called and
8 you're at your kitchen and you're going through a public
9 opinion survey and they are asking you a number of questions,
10 they say to you as you've got one hand on dinner, "What do you
11 look to as sources of right or wrong about views on same-sex
12 marriage," and they give you these categories, I think they are
13 just maybe a clumsy set of categories. So we have not actually
14 asked the question because we didn't think these categories
15 were actually that useful.

16 Q So does that mean you don't think this is valid?

17 A You know, it -- the data is what it says, but I think
18 the -- saying, for example, for many religious people common
19 sense, right, that category draws on their religious beliefs.
20 It is grounded in that what is common sense for religious
21 people is grounded in their religious belief. So I just think
22 these categories are not mutually exclusive categories.

23 Q Fair enough. But you just don't have strong beliefs that
24 are not founded in religion?

25 A Certainly they would, yes.

1 Q But you would agree that this Pew -- you have not done any
2 research that contradicts this.

3 A No.

4 Q So -- and I hope I do the math right. I'll rely on you.
5 But so it appears that of those who strongly favor same-sex
6 marriage, 68 percent -- 81 percent report that philosophy
7 reason, common sense, or science is their primary source of
8 views about same-sex marriage?

9 A Let's see. I've got -- I've got 81 percent --

10 Q 81 percent.

11 A -- on this table. If you add up philosophy and reason,
12 common sense, and science.

13 Q And I know that you did mention that a lot of phone calls
14 is the way you have to do a lot of research in this area.
15 Right?

16 THE COURT: Make sure all your responses are verbal.

17 A Yes, sorry. Start again.

18 Q I apologize. I didn't really give you a chance. I'll try
19 to slow down. But so the same type of problems with -- like
20 people getting ready, cooking dinner, et cetera, those are
21 going to be true of any type of phone study, are they not?

22 A Yes, sir. That's correct.

23 Q Now, again, on D-2.10, that same chart, of those who oppose
24 or strongly oppose same-sex marriage, 55 percent say religion
25 is the primary source of that belief.

1 A Correct.

2 Q But 5 percent say philosophy or reason, 33 percent say
3 common sense, and 5 percent say science. I believe that's
4 43 percent of those who oppose or strongly oppose same-sex
5 marriage at least reported on this survey that their primary
6 source of their beliefs or their opposition were other than
7 religion.

8 A Correct.

9 Q But --

10 A 45 --

11 Q I apologize. I spoke over you. But a majority,
12 55 percent, over 50 percent, reported that it was their
13 religious views that were the basis.

14 A That's right. Majority, 55 percent.

15 Q Doctor, if you would, I'd like to return to CSE-14. That's
16 your organization's report. I would like to ask you about page
17 12 and compare it with page 17. I guess we'll start on page
18 12.

19 A Okay.

20 Q So this is the table regarding "Views on LGBT
21 Nondiscrimination Laws by Religious Affiliation." Correct?

22 A Correct.

23 Q On page 17, is that not the same table?

24 A Yes, sir. This table was duplicated.

25 Q Okay. Now, so I'd like to back up a couple of pages from

1 17 or just back up to page 16.

2 A Yes.

3 Q And on page 16, middle lower part of the page there's a
4 heading "Service Refusals by Religious Affiliation," and then
5 there is some textual analysis.

6 A Correct.

7 Q And you flip over to 17, and I guess my question is was
8 that supposed to be a chart reflecting data on the service
9 refusals by religious affiliation and this was -- was this a
10 mistake? Was it supposed to have a different chart?

11 A The chart was just duplicated here, yes.

12 Q On everything else as I see, there is some type of graphic
13 regarding the headings except for service refusal by religious
14 affiliation. There may be others. I'm not trying to imply
15 anything improper. I'm just saying there's not a chart that
16 reflects that data.

17 A That's correct. The number that I cited are on page 16.

18 Q But I want to -- in comparing those numbers, the numbers on
19 the bottom of page 16 concerning the two major religious
20 groups, which a majority favor allowing small business owners
21 to refuse products or services, white evangelical Protestants
22 is 56 percent and Mormons 58 percent. Correct?

23 A Correct.

24 Q When you turn to 17 against the same chart, 57 percent of
25 white evangelical Protestants and 38 percent say they favor

1 nondiscrimination laws for the LGBT community. Am I
2 interpreting that correct?

3 A That's correct. So for white evangelical Protestants, they
4 both favor basic nondiscrimination laws to protect gay,
5 lesbian, bisexual, and transgender people against
6 discrimination in jobs, public accommodations, and housing. And
7 at the same time, they favor allowing small business owners to
8 refuse services on the basis of religious belief. So they hold
9 both of those views simultaneously, and they strongly opposed
10 same-sex marriage. So that's the portrait of white evangelical
11 protestants.

12 Q Sounds a little confused. But so, again, so they favor
13 nondiscrimination laws but also favor religious accommodations.

14 A That's correct.

15 MR. BARNES: Could I have one moment, Your Honor?

16 THE COURT: Yes, you may.

17 (Short Pause)

18 MR. BARNES: Nothing further. Thank you, doctor.

19 REDIRECT EXAMINATION

20 BY MR. KAYE:

21 Q Just a few questions, Your Honor. Dr. Jones, I'd like to
22 direct you back to Exhibit D-2 --

23 A Yes.

24 Q -- back to page 10 that you were looking at before, the
25 table with the title "Sources of Guidance on Right and Wrong by

1 Views about Same-Sex Marriage."

2 A Yes.

3 Q Based on your understanding of polling methodology, would
4 the questioner have read these subjects seriatim? Would they
5 have read them all and then asked for a response, or would you
6 expect that there would have been an open-ended question and it
7 would have been categorized?

8 MR. BARNES: Your Honor --

9 A I would have to see --

10 THE COURT: Hold on. I assume we have an objection.

11 MR. BARNES: I object to the extent it calls for
12 speculation, and I believe the methodology is provided on the
13 website if we need to explore that. I object. I believe this
14 calls for speculation about what he would expect to see, would
15 it have been read seriatim.

16 A So this is an empirical question --

17 THE COURT: Hold on. Hold on. Rephrase your
18 question.

19 BY MR. KAYE:

20 Q Dr. Jones, are you familiar with the methodology that was
21 used in this study?

22 A I am familiar with the methodology used in this study. I
23 am not familiar with exactly the way this particular question
24 was asked, which is not clear on this exhibit.

25 Q In your studies, when you ask people to explain their

1 reasoning for things, is that something PRRI does?

2 A Yes.

3 Q And how do you present those questions -- those options, or
4 do you?

5 A Well, most of the time we used closed-end questions where
6 we will actually read a list of options. They are usually
7 randomized in their order. But from time to time we will also
8 ask open-ended questions.

9 Q And is this a type of question where if PRRI was asking it
10 you would have left it open ended or closed?

11 A For the most part, I think we would probably have asked
12 this as -- you, know, actually I'm not sure. It may depend on
13 the study, is the honest answer to the question that -- yeah,
14 it depends on -- the judgments that go into this are whether
15 people have a strong sense of previous data that can give you
16 some guidance on a closed-end question. If you don't,
17 sometimes you would ask an open-ended question to try to sort
18 it out.

19 The challenge with an open-ended question is that then the
20 analysts have to take a whole range of responses that may be
21 sentences, some may be paragraphs, some may be one word, and
22 then they have to make some -- the analysts have to make some
23 sense of that data and put them into categories for them to
24 produce a table like this.

25 Q And if this were asked as a closed-ended question, could

1 the respondent choose more than one category?

2 A It depends on the study.

3 Q Okay.

4 MS. KAPLAN: I have no further questions.

5 THE COURT: Dr. Jones, I have a couple of questions,
6 and I'll let the parties follow up based on what I've asked.

7 EXAMINATION

8 BY THE COURT:

9 Q Your research -- do you know from your research or
10 otherwise -- I think you did testify about Mississippi being --
11 only 13 percent of Mississippians claim no religious
12 affiliation whatsoever.

13 A That's right.

14 Q 80 percent claim to be Christian, and I guess of that
15 number, 30 percent are white evangelical Protestants.

16 A That 30 percent is of the entire population. Three in ten
17 of all Mississippians claim to be white evangelical
18 Protestants.

19 Q You were looking at these different groups. Do we know
20 what percentage the population say that they are Jewish, for
21 example?

22 A Yes. In Mississippi that number is very, very small.
23 Mississippi numbers?

24 Q Mississippi numbers.

25 A Yes, less than half a percent.

1 Q What about Muslim?

2 A The same, less than half a percent.

3 Q What about Buddhists?

4 A The same less, than half a percent.

5 Q Hindu?

6 A Less than half a percent.

7 Q Mormon?

8 A The same actually, less than half a percent.

9 Q Has your research indicated what religious preferences
10 members in the Mississippi legislature claim to be?

11 A No, sir. I'm afraid I don't have any data on that
12 unfortunately. The one thing I might add is that there are
13 really two groups that make up six in ten Mississippians and
14 about three in ten are white evangelical Protestants. The
15 other group that is about this same size are African-American
16 Protestants. And between those two groups, that makes up six
17 in ten of Mississippi's population.

18 Q Okay. So you would not know whether there are Muslims in
19 the legislature, for example?

20 A I don't know the answer to that question.

21 Q Or any Jewish members of the legislature?

22 A Sorry. I do not know.

23 Q Or Jehovah's witnesses.

24 A (Witness shakes head)

25 Q Or Mormons. I'm sorry. You need to answer out loud.

1 A No, sir. So all of our data is public opinion data, and we
2 don't have any data on the religious affiliation of Mississippi
3 legislators.

4 THE COURT: Any follow up questions based on what I've
5 asked from the plaintiffs?

6 MR. KAYE: None from plaintiffs, Your Honor.

7 THE COURT: From the defendants?

8 MR. BARNES: No, Your Honor.

9 THE COURT: All right. Is there witness finally
10 excused?

11 MR. KAYE: Yes, Your Honor.

12 THE COURT: Dr. Jones, thank you for coming back home.
13 Spend a lot of money over the weekend here. Plaintiff prepared
14 to call its -- I'll let you confer. Plaintiff prepared to call
15 its next witness? Plaintiff rests?

16 MS. KAPLAN: Mr. Jones -- Dr. Jones, I should say, was
17 our last witness, Your Honor.

18 THE COURT: All right. Defendant wish to call any
19 witnesses?

20 MR. BARNES: No, Your Honor.

21 THE COURT: All right. Okay. Can you approach,
22 please? Just a representative.

23 (At the bench, off the record)

24 THE COURT: Court is going to be in recess for about
25 20 minutes. There will be no closing arguments, but the court

1 will hold arguments on the merits and we will proceed from
2 there. Please take your 20-minute break, and we'll be ready to
3 start back up.

4 MS. KAPLAN: Your Honor, I apologize. Before we
5 start, there is one more housekeeping matter that we probably
6 should do before oral argument.

7 THE COURT: Okay.

8 MS. KAPLAN: That is, at this time plaintiffs offer
9 exhibit into evidence CSE-2, 5, 6, 7, 8 and 9. One was the
10 Episcopal letter that came in through -- was offered in
11 connection with Dr. Hrostowski's testimony, and the others were
12 through Rabbi Simons.

13 MR. BARNES: Your Honor, I believe we have already
14 made our objections and the court --

15 THE COURT: They will be admitted now.

16 (Exhibit CSE-2, CSE-5, CSE-6, CSE-7, CSE-8 and CSE-9
17 marked)

18 THE COURT: Were there other objections -- I think I
19 reserved ruling on Exhibit 30, I think the exhibits tied to
20 that. I had reserved ruling. Have those been admitted, Ms.
21 Smith?

22 THE CLERK: No.

23 MS. KAPLAN: We are no longer offering that. We put
24 her on live.

25 THE COURT: Okay.

1 MR. BARNES: Your Honor, I did have one question
2 about -- we objected to the exhibits to Exhibit 31, I believe,
3 which is the affidavit. Are those -- are those the
4 documents -- have they now come in through another way?

5 MS. KAPLAN: 30 is Dr. Hrostowski -- Reverend Dr.
6 Hrostowski's that we are now waiving. One of the exhibits did
7 come in was 2. The other one we are not seeking to admit.

8 MR. BARNES: Okay.

9 MS. KAPLAN: And the other affidavit was Jasmine Beach
10 Ferrara. I thought we had agreement on that because we didn't
11 put her on.

12 MR. BARNES: We agreed that she would testify to that,
13 but I believe that we specifically objected to the exhibits to
14 the declaration.

15 MS. KAPLAN: So, Your Honor, the exhibits attached to
16 Jasmine Beach Ferrara's affidavit are similar in kind to the
17 ones we just talked about. They are the United Church of
18 Christ's position on these issues.

19 THE COURT: Give me those exhibit numbers again.

20 MS. KAPLAN: 3 and 4. And, Your Honor, one of the
21 arguments that I think they come in under is hearsay exception
22 803(3), which talks about a statement of intent or plan. I
23 think these would both come in as statements of intent or plan
24 as the United Church of Christ's intent or plan with respect to
25 same-sex marriage.

1 THE COURT: Any response from the defendant?

2 MR. BARNES: Your Honor, we still believe they need to
3 have a proper sponsor to put them in context so we stand on our
4 objections.

5 THE COURT: Okay. The objection will be overruled.
6 Obviously any rulings with respect to these exhibits does not
7 bind the court on the ultimate hearing that we might have on
8 the merits in the future. So I'm going to admit those. And
9 that was Exhibits 3 and 4.

10 MS. KAPLAN: Yes, Your Honor.

11 THE COURT: Okay.

12 (Exhibit CSE-3 and CSE-4 marked)

13 MR. BARNES: I apologize. One issue, I don't believe
14 that plaintiffs offered Josh's affidavit with the amicus
15 briefs. Do we need to address that any further as we
16 objected -- I don't believe they offered it into evidence, but
17 we objected to being considered as evidence in the record, and
18 we discussed it before the hearing started.

19 THE COURT: Correct. The affidavit will not be
20 entered into the record, but the court -- the briefs that are
21 attached to that affidavit, the court will look at those as
22 publicly filed documents because they were submitted through
23 various courts. All right. So we'll start back at 10:05.

24 (Recess)

25 THE COURT: I'm thinking -- I guess you can say I was

1 out about 25 minutes, you should have been thinking about this
2 already. I'm thinking how we should proceed.

3 MS. KAPLAN: If it would help, Your Honor, the parties
4 had some discussions about that.

5 THE COURT: Okay.

6 MS. KAPLAN: So what we decided -- and it's obviously
7 completely subject to Your Honor -- is that each side -- these
8 two cases combined and the state would each get an hour for
9 argument, obviously subject to whatever questions Your Honor
10 has. At least kind of rough, that's what we agreed to during
11 the break.

12 THE COURT: One side at a time? That's what I'm
13 trying to --

14 MS. KAPLAN: I apologize for that. That's wasn't even
15 discussed.

16 THE COURT: I'm trying to map out in my head if I
17 allow the Barber plaintiffs to go first, for example, the state
18 respond to those --

19 MS. KAPLAN: If it would help, Mr. McDuff and I have
20 divided the argument so I'm going to be handling the
21 establishment clause part of it, and I gave Mr. McDuff --
22 Mr. McDuff has graciously taken everything else. So we may be
23 able to combine it that way and do both and then let them
24 respond to both. Between us, we'll cover all the arguments.

25 THE COURT: Okay.

1 MR. McDUFF: I think that's right. I'm -- some of the
2 things I'm going to address -- some of the things I'm going
3 to --

4 THE COURT: Make sure you're talking into the mic,
5 Mr. McDuff.

6 MR. McDUFF: Some of the things I'm going to be
7 talking about are actually relevant to both establishment
8 clause arguments, which we have both raised, and the
9 Fourteenth Amendment arguments. But I do think it makes sense
10 for, because there's overlap between our case and the CSE III
11 case, to go ahead and have Ms. Kaplan speak and I will follow
12 up and let the state respond to both of our presentations after
13 which we can reply in whatever time we have left.

14 THE COURT: Okay. Is that okay with the state in that
15 way? Is that okay?

16 MR. BARNES: We think so, Your Honor, yes. We're
17 still mulling it over, but we think yes.

18 THE COURT: We'll do that until it stops working,
19 which is bound to happen.

20 MR. MIRACLE: And I think as we told Your Honor before
21 we started, when we were discussing this off the record that
22 we're trying to not duplicate arguments even though there may
23 be things from Mr. Barnes in the establishment clause portion
24 that relates to Mr. McDuff's briefing, and the same with
25 respect to Ms. Kaplan and the CSE III, Mr. Barnes is going to

1 address, I think, primarily in most of the establishment clause
2 issues. There may be things at the back end, if Your Honor
3 will indulge me, that I may cover as well. I think that's the
4 part we're going have to wait and see, if that's okay with Your
5 Honor.

6 THE COURT: Okay. Okay. Then let's start.

7 ARGUMENT FOR CSE PLAINTIFFS

8 MS. KAPLAN: I'm so excited because I get to push this
9 thing down again. I love that.

10 Good morning, Your Honor. Now, it's obvious to
11 everyone here including, of course Your Honor, that I'm the
12 lawyer in this case. My job is to advocate so I don't
13 really -- I couldn't as a matter of professional obligation
14 have an objective view on this case.

15 But keeping that in mind, I really don't think that
16 under the establishment clause -- settled establish clause
17 jurisprudence of this country this is a very difficult case.
18 In fact, I think it's an easy case.

19 I think it's clear from the evidence that you've heard
20 and from the case law -- and there's years and years of
21 established case law on this -- that HB 1523 falls clearly
22 within the ambit of the First Amendment's establishment clause
23 and is exactly the kind of statute that the clause was designed
24 to prevent.

25 Before I get into the weeds, I thought that it might

1 be a helpful to read some passages from prior Supreme Court
2 opinions which I think make this point very clear. I'm going
3 to start from a quote from Justice Black in the *Everson* case in
4 1947. And what he says, he's describing the establishment
5 clause and the origins of it in terms of this nation's history.

6 And he says, "A large proportion of the early settlers
7 of this country came here from Europe to escape the bondage of
8 laws which compelled them to support and attend
9 government-favored churches. The centuries immediately before
10 and contemporaneous with the colonization of America had been
11 filled with turmoil, civil strife and persecutions, generated
12 in large part by established sects determined to maintain their
13 absolute political and religious supremacy.

14 "With the power of government supporting them, at
15 various times and places Catholics had persecuted Protestants.
16 Protestants had persecuted Catholics. Protestant sects had
17 persecuted other Protestant sects. Catholics of one shade of
18 belief had persecuted Catholics of another shade of belief.
19 And all of these had from time to time persecuted the Jews.

20 "In efforts to force loyalty to whatever religious
21 group happened to be on top and in league with the government
22 of a particular time and place, men and women had been fined,
23 cast in jail, cruelly tortured and killed."

24 One more quote, and this is from Justice Clark in the
25 *Abington Township* case from 1963. "The wholesome neutrality of

1 which this court's cases speak thus stems from a recognition of
2 the teachings of history that powerful sects or groups might
3 bring about a fusion of governmental and religious functions or
4 a concert or dependency of one upon the other to the end that
5 official support of the state or federal government would be
6 placed behind the tenets of one or all orthodoxies."

7 I don't think, Your Honor, that it is exaggeration to
8 say that the times that we live in in this country today with
9 fierce debates going on about religion and between religions,
10 as you heard in the testimony, particularly -- on all issues,
11 but particularly on the issue of the equal dignity of LGBT
12 people, that these times are not all that different from what
13 was experienced by the early colonists. As I said before, you
14 saw it and you heard it in the testimony that we presented over
15 the past day.

16 They too, the colonists, just like the people you
17 heard from, had fierce debates about matters of religion,
18 including taxation to support official churches. Those debates
19 too were vigorous, controversial, at times even rancorous. But
20 our founders decided to resolve those disputes by preventing
21 the establishment of any religion by the state.

22 The point was -- and this was true -- the State of
23 Virginia prior to the First Amendment had a state religion.
24 The point of the first -- of the establishment clause of the
25 First Amendment was to stop that, to prevent it, and to make

1 sure that states like Virginia, Rhode Island, South Carolina,
2 et cetera, could not have an established religion or religious
3 belief of the state.

4 As Justice Kagan explained recently when quoting
5 George Washington's 1790 letter to the leader of the Rhode
6 Island Jewish community, "This is America's promise in the
7 First Amendment: Full and equal membership in the polity for
8 members of every religious group, assuming only that they, like
9 anyone who lives under the government's protection, should
10 demean themselves as good citizens."

11 So I'm going to address, Your Honor, as we said before
12 I started, the section or the prong of the preliminary
13 injunction standard that goes to likelihood of success. And I
14 will be focusing solely on the establishment clause arguments.

15 As I said yesterday, we essentially have three
16 arguments -- independent and separate arguments under the
17 establishment clause, each of which I think violates -- voids
18 the statute and any one of which could void the statute.

19 The first one is that HB 1523 impermissibly endorses
20 religion. The second one is that HB 1523 prefers some
21 religions or some religious beliefs over others. And the third
22 is that HB 1523 creates an impermissible accommodation because
23 it does not take into account the burden it imposes on people
24 who do not hold the preferred religious beliefs, namely, LGBT
25 people.

1 Let me start with the endorsing religion argument.
2 This one I think, as I said before, like all of them, is pretty
3 easy. Let's start with the name of the bill. The bill itself
4 is entitled "The Protecting Freedom of Conscience from
5 Government Discrimination Act." In it, as we've heard over and
6 over in the past couple of days, it talks explicitly about
7 three specific preferred, quote, religious beliefs, unquote,
8 or, quote, moral convictions.

9 Public statements by the drafter, sponsors, and
10 proponents of HB 1523 make its religious purpose crystal clear.
11 And on this I want to, again, be very clear. This is not a
12 situation where even Justice Scalia contended that a court
13 could not consider legislative history.

14 In considering whether the purpose of a statute under
15 the establishment clause endorses or promotes religion in an
16 unconstitutional way, the Supreme Court has instructed judges
17 to look at the context in which a government policy arose.
18 That comes from the *McCreary County, Kentucky*, case. And,
19 indeed, the court has said, Justice O'Connor now, that the
20 court -- the court must be deemed aware of the history and
21 context of the government action.

22 Now, as you heard from Professor NeJaime, HB 1523
23 appears to have been drafted, at least in parts, by the
24 Alliance Defending Freedom, which describes itself as a
25 Christ-centered ministry that fights to keep the doors open for

1 the gospel. And it and its compatriot organizations have taken
2 the position that homosexual behavior is sinful and unnatural
3 and that all gay and lesbian people live in rebellion against
4 God and his created order.

5 Now, I understand -- I expect the State to argue,
6 *Well, what's the big deal, Ms. Kaplan?* because in any statute
7 you have groups advocating for the statute. Different groups
8 draft statutory language and give it to legislatures. That's
9 just part of the Democratic process.

10 While that is certainly true, when the court is
11 considering whether a statute has a religious purpose, was
12 religiously motivated, endorses and promotes religion, the fact
13 that it was drafted, promoted and supported by an explicitly
14 religious organization is relevant to determining whether or
15 not it has any possible secular purpose.

16 While there is a fuller account --

17 THE COURT: What about if members of the legislature
18 simply just find the existence or the nature of same-sex
19 marriages being something, they're philosophically opposed to
20 the notion and want to do everything that they can do to
21 restrict the dignity on those people separate and apart from
22 whatever religious views they might have?

23 MS. KAPLAN: So I think the answer -- so what you're
24 basically -- if I understand your question, Your Honor, is if
25 the legislators had been, shall we say, more careful and if

1 they had not used words like "religious belief" and they had
2 not made the statements that were made during the legislative
3 debates, et cetera, but they just wanted to restrict LGBT
4 rights as a matter of dignity in some kind of secular way, what
5 would be the problem?

6 Whether or not it would be an establishment clause
7 problem would depend. That's not the case before us. It
8 certainly would be an equal protection problem because under
9 *Windsor* and *Obergefell*, the Supreme Court has made it pretty
10 clear that there is no constitutional -- there is no rational
11 basis for the United States government in any way to treat LGBT
12 people differently for any secular nonreligious reason. If you
13 look at both those cases, they go through the reasons and they
14 reject them all as a constitutional matter.

15 THE COURT: And how much of the legislative debate --
16 I forget how many members in the Mississippi -- how many
17 members of the legislature there are in the house and the
18 senate. It's a lot. It's a lot in the house. 144? I don't
19 know. Whatever the number that is, it's way up there.

20 How do you extrapolate from the debate what one or two
21 or five or six might say about a particular bill -- whether
22 it's a sponsor or anybody else, how do we know that that -- if
23 they say, *This is -- I'm doing this because I'm a Christian*,
24 the house member who is sitting in the seat, because they do
25 share tables, I think, or some desk, the desk-mate might vote

1 for it for his own independent reason separate and apart from
2 his colleague's view that it has anything to do with religion.

3 MS. KAPLAN: I would say two things. I'd say, first
4 of all and most crucially, you're going to want to look at the
5 statements made by the proponents of the bill because, again,
6 you're trying to figure out what is the purpose of the bill.
7 And the most probably relevant evidence of that is what the
8 proponents say. And, second of all, again, I'm going to rely
9 on this exception, this carve-out that the Supreme Court has
10 made for legislative history in the context of the
11 establishment clause.

12 Your Honor raises a very good question. It's a
13 question that Justice Scalia has raised in connection with
14 equal protection and other issues, but because the
15 establishment clause says that the government shall not
16 establish religion, the Supreme Court has said -- then you're
17 talking about state action. The Supreme Court has said, which
18 is relevant to standing, which I can touch on. But the Supreme
19 Court has said that looking at statements like this is, in
20 fact, permissible and, in fact, should be done. You need to
21 understand the context in which the statute was presented to
22 the legislature.

23 Obviously, no one can get in the minds of any
24 individual person when they vote. And I would suspect that if
25 you actually -- if they were aware of these issues and you

1 asked some of the proponents now today did they -- if you put
2 them on the stand and said, *Did you pass this for religious*
3 *reasons?* they'd give you the answer no. I suspect that's not
4 motivated them actually at the time.

5 Now, the defendants' other argument that HB 1523 was
6 enacted to create a constitutional accommodation of religion is
7 discredited here by the fact -- two reasons. One, as you've
8 heard me say -- and I apologize for my objection yesterday.
9 You heard me say it. There's this thing called the First
10 Amendment, free exercise clause. It's been around since the
11 establishment clause. It's always existed and it's applied to
12 the State of Mississippi since the Supreme Court applied the
13 Bill of Rights.

14 So there's always been -- that's where accommodation
15 law first began, as you heard Professor NeJaime explain.
16 That's always existed. But even on top of that, you have a
17 Mississippi RFRA which fully protects those rights. But unlike
18 HB 1530 -- HB 1523 does so in a neutral way. Moreover, the
19 Supreme Court precedents make it clear that you're not
20 permitted to look at a statute in the establishment clause
21 context in a vacuum the way the State is suggesting.

22 In *Wallace v. Jaffree*, the court declined to credit
23 Alabama's stated secular rationale of accommodation for
24 legislation authorizing a period of silence in schools for
25 meditation or voluntary prayer given the implausibility of that

1 explanation in light of another statute that already
2 accommodated children who wish to pray. So too here, Your
3 Honor. Exact same thing is true with respect to the
4 Mississippi RFRA.

5 THE COURT: So you're saying that the Mississippi RFRA
6 is enough to protect persons who might have religious views who
7 are working for the public?

8 MS. KAPLAN: It's enough to do so in a
9 constitutionally permissible way. Correct. A, it's neutral as
10 to religions and religious beliefs; and, B, it requires the
11 balancing of burdens that the Supreme Court has said must be
12 done in connection with a religious accommodation.

13 THE COURT: And speaking to the religious beliefs, are
14 we -- other than the context of a couple of members in the
15 legislature invoking Christianity and saying it's Christian,
16 couldn't -- what other -- what other label -- I mean, is there
17 a -- can there -- can there be another label? I mean, other
18 religions might also have that same view. Other than the
19 members of the legislature saying that this is Christian, is
20 that enough to say that the RFRA laws are not enough? I
21 mean --

22 MS. KAPLAN: I don't understand -- I understand that
23 religious proponents would like to have RFRA the way this is
24 that are automatic. So under HB 1523, you get the right to do
25 various things and you don't have to prove anything. It's

1 automatic. You say, *This is my belief*; you can do it.

2 Under RFRA, that's not the case, under any of the
3 RFRA's. I think you heard Professor NeJaime say this. There
4 has to be a balancing of the burdens and the burden on the
5 believer and the burden of others. That's what the Supreme
6 Court has said is constitutionally required.

7 I would refer Your Honor to Justice Ginsburg's opinion
8 in the *Cutter* case in which she was considering the
9 constitutionality -- I'm going to mangle this -- of the RLIUPA
10 statute, which was the statute that was passed by Congress in
11 the wake of the decision that Congress didn't have authority to
12 pass federal RFRA, and that's exactly what she says. So I
13 think it's the most you can get and be constitutionally -- I'm
14 going use a religious term -- kosher under the constitution.

15 Now, in an effort to kind of come up with some
16 nonreligious, permissible purpose for HB 1523, we seem to hear
17 yesterday, again similar things, that the statute is needed to
18 protect a minister's ability to marry whomever they choose.
19 But no statute was needed for that. Frankly, you don't need a
20 RFRA for that.

21 Going back to what you heard me say about the
22 founders, from the very beginnings of this country it's been
23 very clear that no state or federal government has any ability
24 to tell any minister, rabbi, imam or anyone who's religious who
25 they can or cannot marry. That's the part of religious belief

1 that is fully protected by the free exercise clause -- or
2 exercise clause.

3 In the *Hosanna-Tabor* case, 132 S.Ct. 694, the Supreme
4 Court said that "The First Amendment guarantees houses of
5 worship the power to decide for themselves, free from state
6 interference, matters of church government as well as those of
7 faith and doctrine." And we completely agree with that.

8 THE COURT: And nothing about *Obergefell* or anything
9 else shifted the landscape with that simple proposition.
10 Nothing.

11 MS. KAPLAN: Nothing. In fact, it actually came up in
12 argument. I was sitting there in the court that I day at
13 argument. And I think it was Justice Scalia asked Mary Bonauto
14 some questions about that, and her answer was, *It's already*
15 *protected. You can't tell a minister or a rabbi who they can*
16 *marry.*

17 HB 1523's use of the word "moral convictions" does not
18 save the statute either. In this context, the court has said
19 that a statute doesn't need to adopt -- it does here, but it
20 doesn't need to adopt explicit language identifying the
21 religious beliefs or the religious basis for the beliefs to run
22 afoul of the establishment clause, especially where it is clear
23 that it's religious belief and religious convictions that
24 motivated the law in the first place. And I would refer Your
25 Honor to the *Epperson* case discussing Arkansas -- the Arkansas

1 law relating to teaching of evolution.

2 THE COURT: Is that any different from the *Wallace* and
3 *Jaffree* case where the moment of silence is just a moment of
4 silence? A kid could be thinking or being silent on whatever
5 issue he wants to be. Right?

6 MS. KAPLAN: Exactly right. I -- exactly right. I
7 would say that their argument -- the argument was stronger in
8 *Wallace* and *Jaffree* for the other side than it is here.
9 Exactly right, Your Honor, because there's more arguably
10 secular purpose to a moment of silence than there is to a law
11 that says there's these three religious beliefs.

12 Moreover, the court in *McCreary* made it clear that the
13 secular purpose for the statute has to be genuine, not a sham,
14 and not merely secondary to the religious objective. And we
15 cite that in our brief. So that's, I think, it for my argument
16 on endorsement. I think it's crystal clear.

17 But this law favors -- subtles -- excuse me -- suffers
18 from another fatal constitutional flaw which is that it
19 impermissibly discriminates between religions and between and
20 among religious believers even within religions, as you heard
21 about the testimony of Carol Burnett -- we can't believe she's
22 named Carol Burnett. We've all been talking about that on the
23 team -- from Carol Burnett, not the comedian, who testified --

24 THE COURT: I'm so glad we had this time together.

25 MS. KAPLAN: -- who testified about the Methodists.

1 So, as you know, HB 1523 protects only three state-specific
2 religious beliefs. As you've heard in I think an overwhelming
3 record that we put forward to the court, those beliefs are
4 protected by some but not by all religious persons. They are
5 adhered to by some but not all religions. And that is true as
6 we heard this morning and from Your Honor's questions even
7 within the state of Mississippi.

8 I think here you have kind of the classic -- if we're
9 focusing on Mississippi, you have the -- kind of the classic
10 establishment clause problem, just like George Washington was
11 talking about with the leader of the Jewish community in
12 Rhode Island, where you do have some minority religious groups
13 in Mississippi -- Jews, Episcopalians, and others -- who believe
14 that their religion compels them to recognize the dignity of
15 everyone as created in the divine image and to fully recognize
16 the equality of LGBT people, and you have religions -- majority
17 of religions in the state of Mississippi that do not.

18 It's clear under the law that giving -- extending
19 special rights and privileges -- and I can go through those
20 rights, the automatic exemption I already referred to under the
21 statute -- that giving those rights to certain believers or
22 certain sects and not others violates the establishment clause.
23 That's why all the other RFRA's up to now have been neutral,
24 even if they were actually being promoted by Christian groups.

25 The Supreme Court has adhered to the principle -- and

1 this comes from the *Larson* case -- clearly manifested in the
2 history and logic of the establishment clause that no state can
3 pass laws which aid one religion or that prefer one religion
4 over the other.

5 And, indeed, a statute isn't required in this analysis
6 to specifically identify which religious -- which religious
7 groups or which religious views it's denigrating. For example,
8 in the -- I guess it's the *Larson* case, the statute, which was
9 about the Moonie church, but the statute itself did not say it
10 was about the Moonie church. It punished by requiring
11 disclosure of churches that got more than 50 percent of their
12 donations from nonmembers. That's all the statute said.

13 And the Supreme Court concluded that that was clearly
14 singling out certain religious groups, treating them
15 differently than others, even though it was not doing so based
16 on religious beliefs. It was just based on how much money they
17 got from which people, that that was a violation of the
18 establishment clause principle that you can't distinguish
19 between and among religious groups.

20 And, again, here the word "moral conviction" doesn't
21 save the statute. In America overall, there's a relative --
22 not relative. There's a strong minority of Americans who are
23 nonreligious who have a separate moral conviction, if they do
24 at all, that gay people shouldn't be allowed to get married.
25 And in Mississippi, the amount of nonaffiliated Mississippians

1 is almost negligible.

2 The State's attempt to draw parallels here to the
3 laws -- certain laws relating to abortion also don't work in
4 their favor. The State points to the Church Amendment, for
5 example, which provides that grant recipients cannot
6 discriminate against the doctor for having refused to perform
7 abortions. However, the statute also gives the same privilege
8 to doctors who perform abortions.

9 Again, it's neutral as to any religious view one way
10 or the other on abortion. It does not do what HB 1523 does and
11 pick a side, rest its hands on one side of the scale.

12 Moreover, the church amendment, unlike HB 1523, is
13 relatively narrowly constructed or narrowly created in order to
14 provide exemptions only for particular acts related to
15 abortion. Here, HB 1523 in terms of its breadth goes way
16 beyond one specific circumstance. It goes through many, many
17 other circumstances that the legislature couldn't possibly have
18 weighed, as I said is required by Supreme Court precedents, the
19 difference between the burden on the believer and the burden on
20 people who are hurt by the statute. And that's very different
21 than what they were considering in the abortion contest.

22 THE COURT: So is there any difference than between --
23 I guess those who might oppose performing abortions -- there is
24 an argument, I guess, that they oppose it because they are
25 killing a child --

1 MS. KAPLAN: Yeah.

2 THE COURT: -- or a future child or stopping life.
3 Should the court view the -- the issue of issuing a marriage
4 license similarly, someone could have such moral objection to
5 participating at all in anything that in their religious view,
6 their sincerely religious -- religiously held view, that they
7 cannot participate at all in that process? Is there -- you
8 talk about balancing the harm.

9 MS. KAPLAN: So I would say two things. So, one, in
10 the *Harris v. McRae* case, if you look at the lower court
11 decision, the lower court found that they're -- exactly what
12 Your Honor is pointing to, that because of this view -- and I'm
13 not saying I adhere to it, Your Honor -- that abortion is a
14 form of killing, that there was a not identifiable religious
15 purpose for the statute.

16 Here I think you have to look at HB 1523 as a whole.
17 A, there's no secular purpose. And you have to look at other
18 portions. Whether a particular public official should be
19 allowed or not allowed to issue a license to a gay couple based
20 on their sincerely held religious belief, first of all, that's
21 already protected in RFRA, in the Mississippi RFRA.

22 Second of all, what has to be done there is exactly
23 what we've asked for in CSE I, which is figure out what the
24 situation is. Are there other people that can do it? What's
25 the burden? Is there an impediment underlay or not? We don't

1 know the answers to those questions.

2 But, here, HB 1523 imposes automatic exemptions in a
3 whole host of other areas where it's very hard to see what the
4 secular purpose could be. Not allowing -- allowing a counselor
5 who's otherwise ethically required to do so -- here's the thing
6 we were talking about last night, which is the most horrific
7 maybe example of the statute.

8 Say a kid -- a teenage kid has been going to a mental
9 health counselor because he is depressed. And let's say in the
10 course of those counseling sessions that the kid -- and perhaps
11 even suicidal. The kid says, *You know what? I think the*
12 *reason I may be feeling this way is because I might be gay.*

13 Let's assume at that point in time, which they would
14 be authorized to do under this statute, although not authorized
15 under their ethical guidelines, the counselor says, *"You know*
16 *what? No more counseling. I think you're going to hell, and*
17 *I'm not going to counsel you anymore. I can't see you ever*
18 *again.* They are entitled to do that under the statute. I
19 don't even want -- I'm not even going to try to speculate of
20 what the implications of that could be.

21 So it's very, very hard when you look at the statute
22 as a whole to come up with any secular purpose for this
23 statute. Sure, in individual circumstances there may be
24 individual accommodations that would satisfy the
25 First Amendment under free exercise, but that's not what the

1 statute does. It gives an automatic exemption. It doesn't
2 even, as we talk about, require that there be some finding that
3 there's no impediment or delay before the clerk recuses.

4 THE COURT: Does -- speaking of that example with the
5 counselor, does HB 1523 apply to any and all government
6 officials, state or local, or -- I'm just -- I'm asking. How
7 wide is the breadth of 1523?

8 MS. KAPLAN: As I recall, the definition of "person"
9 in the statute is pretty broad. There's a state government
10 definition which pretty much means anyone acting for the state
11 government or under color of state law. And that's
12 Section 9(2)(a) -- Section 9(2)(a). And then it defines
13 "person" as a natural person in his or her individual capacity
14 regardless of religious affiliation or in his capacity as a
15 member, officer, owner, volunteer, employee, manager, religious
16 leader, clergy, or minister of any entity. It's pretty broad.

17 So if you had a federal employee in the state of
18 Mississippi who is not a state employee, they would certainly
19 qualify as a natural person. They might be violating federal
20 law in doing so. And the crucial thing there, frankly, is
21 they -- if they violated federal law -- and this is an issue
22 with state court judges that we looked about.

23 Actually, if you look at HB 1523, it requires state
24 court judges to violate the constitution and violate the
25 federal law, because it tells them that they must ignore

1 provisions like Title IX, which protects transgender people,
2 and Title VII, which says you can't make the kind of
3 distinctions based on gender that the statute allows. It
4 creates a horrible problem for that state judge if someone
5 brought a civil rights case and they are supposed to be
6 ignoring the constitution and federal law, I don't know what
7 that state's judges do. And they're subject to an injunction.

8 THE COURT: Well, and the State may be -- obviously,
9 the State is listening to the questions that I'm asking because
10 I will want to know the answer to this.

11 For example, you mentioned a counselor. Could a
12 teacher decide that she's not going to -- he or she is not
13 going to teach a class because the class contains children who
14 are being reared in the home of a same-sex couple because,
15 again, that child is being influenced by a same-sex marriage
16 that the teacher does not agree with, and can that teacher then
17 refuse or tell that principal, *That child must be removed from*
18 *my classroom?*

19 MS. KAPLAN: I think that could, Your Honor. I mean,
20 it would be -- it certainly would be a colorable claim under
21 HB 1523. And if the teacher got disciplined by the school, if
22 the teacher said, *I don't want to teach this kid*, and the
23 school then instead, *Okay. You're fired*, that teacher would
24 have a claim for immunity in an injunction under HB 1523.

25 And even worse, frankly, is the situation you heard

1 about from Joce Pritchett where it's probably more likely that
2 what teachers are going to do rather -- I'd rather, frankly,
3 have them not teach the kid. The worst scenario is that they
4 are going to teach the kid and they're going to say things to a
5 five-year-old or a six-year-old that are just horribly scarring
6 and horribly offensive to that kid's dignity and self-esteem,
7 which we all know is so important, particularly for kids -- as
8 parents, for kids at that age.

9 The State's argument that HB 1523 is somehow required
10 by *Obergefell*, we talked that a little bit in that the sense
11 that we don't under the argument the First Amendment and RFRA
12 always existed. Moreover, *Obergefell* doesn't deal with two of
13 the three religious beliefs in HB 1523. It doesn't deal with
14 marriage -- the court didn't say anything about people not
15 having sex before marriage, which I think is protected going
16 back to *Griswold*, by the way.

17 And it didn't say anything about transgender issues,
18 about this fact that you -- whatever biology was -- you come
19 out of the womb with is necessarily your biology forever, even
20 though, frankly, as a matter of science -- and you heard it
21 here from the rabbi, unfortunately -- that's -- there are kids
22 who come out of the womb with indeterminate genders.

23 THE COURT: What the kid who comes out of the womb
24 with a particular sex, like a little boy who goes through
25 circumcision that is botched --

1 MS. KAPLAN: Right. That's exactly right. And that
2 happened --

3 THE COURT: -- totally botched, and the child is so
4 young that the parents might have to make the choice of the
5 child living the rest of his life, his life, without a penis --

6 MS. KAPLAN: Yeah. It --

7 THE COURT: -- or use treatment and therapy because
8 the child is so young to engage in the same-sex -- excuse me --
9 the sex change operation? But 1523 would -- how would that
10 treat that child?

11 MS. KAPLAN: Again, the -- someone could treat --
12 could basically discriminate against that child. Almost anyone
13 in the state of Mississippi could refuse to provide goods or
14 services to that kid, including counseling, psychological
15 services, including accommodations and restaurants, at a
16 private -- I know there's a place my son went where there's
17 like a water park somewhere in Jackson. They could refuse to
18 let the kid go into the water park all based on the view -- the
19 religious view that whatever the parents did with respect to
20 that kid they shouldn't have done because whatever his or her
21 gender was was some different gender that was determined at
22 birth.

23 And you heard the rabbi talk about it in the Talmud.
24 The rabbis actually talked about this a lot because you won't
25 be surprised to hear circumcisions were botched from time to

1 time, sadly. And that is something that happened and
2 continues, sadly, to happen today.

3 Let me go to the third of our arguments, which is the
4 not taking into account -- it creates an absolute accommodation
5 without taking into account the burdens. The court -- the
6 Supreme Court case that is key on this is the *Estate of*
7 *Thornton v. Caldor* case. That's a case that involved a Sabbath
8 law in Connecticut that gave people exemptions based on Sabbath
9 observance.

10 The problem with the case and the problem with the
11 statute is it didn't take into account the burdens both on the
12 observer and on the employer. *Caldor* was about a guy who
13 didn't work to work on the Sabbath and lost his job. And what
14 the court said there is because the statute didn't take that
15 into account and didn't think about the burdens on a small
16 private employer and whether they had to let everyone take
17 Sabbath off, it was unconstitutional.

18 That's not to say that you can't have Sabbath
19 accommodations. You can. But like under RFRA, you need to do
20 the balancing. And that's what this statute doesn't do. It
21 gives an automatic -- like in Monopoly, you get a "Get Out Of
22 Jail Free" card automatically without any consideration.

23 We've outlined the burdens pretty extensively in our
24 brief, the burdens on gay people. I don't think I need to go
25 into that. And you heard some of it in the testimony itself.

1 I'm happy to answer any questions, but I think you know what
2 they are. And, again, they are outlined pretty comprehensively
3 in our brief.

4 I'm going to turn really briefly to the standing issue
5 because I'm running out of time, and I apologize. It's
6 important to note here that standing under the establishment
7 clause is different than standing in almost any other statutory
8 or constitutional area. And the reason for that, if you think
9 about just as a matter of logic, the establishment clause says
10 that the state cannot establish a religion.

11 So it's necessarily talking about what the government
12 can do, and it's necessarily talking about the state
13 establishing or endorsing certain beliefs. And it's very clear
14 from what we've presented that our plaintiff Susan and Joce,
15 who is a CSE member, have established classic establishment
16 clause standing, the kind of standing that you've seen in other
17 cases.

18 For example, if there was standing in the *Austin* case
19 that we cited in our brief, the *Murray v. City of Austin* case,
20 if the plaintiff there had standing to challenge the insignia
21 of the City of Austin that had a coat of arms in it with a
22 cross, there can be no question, it's laughable, Your Honor, to
23 suggest that our clients don't have standing to challenge
24 HB 1523.

25 And, indeed, if you take the State's arguments to its

1 logical conclusion, if the State of Mississippi were to pass a
2 law saying that the Southern Baptist Church is the official
3 church of the state of Mississippi without having any spending
4 or anything that goes along with it, under the State's logic,
5 no plaintiff would be -- would have standing to challenge that
6 statute because there would be no one to sue under *Okpalobi*.

7 That cannot be correct. It is not correct. And if
8 you look at the court's decision in the *Blanco* case in the
9 Eastern District of Louisiana which considered this question of
10 establishment clause standing in *Okpalobi*, it clearly
11 determined that not only did the plaintiff have standing but
12 that redressability was satisfied because the establishment
13 clause is different.

14 I would argue that exactly the same logic applies
15 here. And I'm really running out of time. So I'm going to
16 cede to my able colleague Mr. McDuff.

17 THE COURT: All right. Before you do, you did
18 indicate this notion of different religious sects, religious
19 beliefs. If it is not explicit, I guess it's your view that we
20 look at other things -- the context I think is what you said
21 with respect to -- if it's not explicit, you look to the
22 context of just its passage or who might have sponsored, I
23 think you sort of said? What other things do you look at as
24 far as to show context or what type of evidence would one try
25 to look to to determine if it has a religious purpose.

1 MS. KAPLAN: So that's why we put on
2 Professor NeJaime. I think it's totally appropriate here to
3 also consider the history of these laws, how they developed
4 over time, who is currently supporting them. I think
5 Professor NeJaime said this. If he didn't, it certainly is in
6 his article. But what he had said is that basically once the
7 conservative religious groups lost the argument in *Windsor* and
8 then *Obergefell* that gay people don't have equal dignity under
9 the constitution, they shifted that religious argument from an
10 equal protection kind of strategy to a religious accommodation
11 strategy.

12 And they make it very clear in their materials that
13 that's what they're doing. They make it very clear that
14 they're doing it for religious reasons.

15 The other thing I think I would say is that you don't
16 have to specify -- this statute actually does specify its
17 religious belief and says what they are, but under the decision
18 about the Moonies, the court was so careful that it said even
19 if you have a law that treats certain religious groups
20 differently based on who their donors are, that violates the
21 establishment clause. So it's very, very careful, I would say
22 strict construction in terms of laws that distinguish among
23 religions and among religious beliefs.

24 THE COURT: Hypothetical here. I know 1523 identifies
25 three specific things that it does, but suppose it also -- you

1 think about -- I think somebody mentioned the Eucharist and all
2 of that, the bread and the wine. Obviously, bread has its own
3 makeup, but it has special significance in religion. So does
4 wine, has -- it's made out of grapes and whatever else, but it
5 has a tie to some religions and, for particular, it is
6 sacrosanct, I guess, I mean, if you -- in some religions.

7 So the -- would it be constitutional to protect bread
8 and wine? I mean, it's not to say bread and wine as a -- can
9 you say that that would be secular and not religiously based in
10 some way?

11 MS. KAPLAN: What I would say, Your Honor, is if the
12 state were to pass a law -- two things. One, if the state were
13 to pass a law that somehow restricted wines that are made --
14 for example, I'm thinking of kosher wines, which is my
15 religion. So I know it best. If they somehow passed a law
16 that said you couldn't sell -- make or sell kosher wine and
17 there's certain chemicals that can't be in kosher wine and
18 those chemicals have to be in all wines in the state of
19 Mississippi, I think the -- that the manufacturers of those
20 wines and Jewish people would have a very strong free exercise
21 claim. Even if they didn't have it under the constitution,
22 which I think they do, they would surely have it under
23 Mississippi RFRA. That's analogous to the peyote smoking
24 situation -- drinking situation that I'm sure you're familiar
25 with.

1 The other thing I would say is that the Supreme Court
2 has said a couple of times now that a tax on yarmulkes is a tax
3 on -- is an establishment clause violation with respect to
4 Jewish people. You can't take a yarmulke and say that somehow
5 that's some secular things and, therefore, there's no religious
6 purpose.

7 With bread and wine, you could have. You obviously
8 can regulate the production of bread and wine in the state of
9 Mississippi. The state has every right to do that and that's
10 under -- probably just under rational basis for equal
11 protection. But if it's doing so in a way that's trying to get
12 at some kind of religious practice or observance relating to
13 either bread or wine, then it potentially would be an
14 establishment clause violation and you'd have to look at the
15 balancing test that RFRA requires.

16 THE COURT: Because the state -- because the
17 legislature has passed something that says "sincerely held
18 religious view," "moral convictions" -- I think all of those
19 words are in there somewhere -- doesn't that capture every
20 religion?

21 MS. KAPLAN: It would in the RFRA. It does in the
22 RFRA. The RFRA says "sincerely held religious beliefs," and it
23 doesn't specify them. The problem with this statute -- the
24 statute that -- that makes the statute so egregious -- and,
25 frankly, I don't even know why the AFA tried to promote because

1 it's just so unconstitutional on its face -- is that it picks
2 three religious beliefs.

3 The legislative history we talked about there was some
4 questioning of one of the senators about, *Well, what about*
5 *people who believe, I think, in the Sabbath or people who have*
6 *religious beliefs against drinking, would they be protected*
7 *under this statute?* And her answer, as I recall, was no.

8 This statute only protects three religious beliefs
9 relating to gay people, transgender people, and having sex
10 before marriage. That's exactly what statutes can't do. They
11 have to be neutral with respect to matters of religion. If the
12 establishment clause means anything, it means that.

13 THE COURT: You mentioned standing -- and I realize
14 I'm stepping on some of your time. You'll get all of that
15 back. I want to make sure, does the court have to find
16 standing as to each plaintiff?

17 MS. KAPLAN: No. Under established Fifth Circuit law,
18 you only have to find standing as to one plaintiff and one
19 defendant.

20 THE COURT: Okay. So is -- okay. But standing is
21 not -- standing good to one is not good to all.

22 MS. KAPLAN: It's not good to all, but because this is
23 an establishment clause case and because what we're seeking is
24 invalidation of the law, it frankly doesn't matter.

25 THE COURT: And the invalidation of the law itself

1 would redress these plaintiffs' injuries, I presume?

2 MS. KAPLAN: No question about that, Your Honor.

3 THE COURT: So that I'll have your point on
4 concreteness, which is an element of this standing thing, let
5 me hear you on how -- how do -- how have you proved
6 concreteness?

7 MS. KAPLAN: Let me talk about concreteness. This
8 comes up a lot in the establishment clause in the cases -- and
9 the state relies on this. I'm glad Your Honor asked it.
10 There's a whole line of establishment clause cases about
11 erecting crosses or creches or religious symbols. And the
12 courts have come out, frankly, both ways on whether plaintiffs
13 have standing in those cases.

14 In the *Valley Forge* case, the court held that the
15 plaintiff there didn't have standing because -- I think it was
16 Pennsylvania?

17 THE COURT: Yes.

18 MS. KAPLAN: It was Pennsylvania and the plaintiff
19 lived out of state. I mean, it was kind of a silly case to
20 bring. And they couldn't prove that they actually had to daily
21 encounter this huge cross that offended them. And they said
22 that's not sufficiently concrete.

23 This is exactly the opposite. This presents the
24 paradigmatic case on the opposite. Here you're talking about
25 plaintiffs who live in Mississippi, who have to every day face,

1 as you heard the Reverend Hrostowski say, the concern that they
2 could walk into a restaurant and not know whether they could be
3 kicked out. It doesn't get much more concrete than that, Your
4 Honor.

5 THE COURT: But if they walk into a restaurant -- I've
6 got to use my hometown, Yazoo City. Nobody in Yazoo City knows
7 the Hrostowskis. And when they walk through the door, they are
8 going to see two ladies coming in to have a nice little lunch
9 or whatever. Why should they have any fear about going to any
10 restaurant --

11 MS. KAPLAN: Because --

12 THE COURT: -- when nobody knows them or their
13 relationship?

14 MS. KAPLAN: Because sometimes people see two women
15 with a son -- they have a 16-year-old kid -- and you see two
16 women with a son and you assume they're -- you know, in the way
17 they're relating to each other -- they don't have to make out
18 on the way to the restaurant, but the way they are relating to
19 each other as a couple, and people assume that they are a
20 lesbian couple.

21 You know, you can't live your life -- I can speak for
22 myself, Your Honor. You don't know what people are going to
23 think and you can't -- if you have to live your life thinking
24 about that, if you even have to worry going into the restaurant
25 about how you relate to your wife -- and, again, not talking

1 about being unduly intimate, but even touching her or how you
2 walk in, that's exactly the kind of concrete injury. Frankly,
3 that's much more concrete injury than in almost any case in
4 which the court has found there to be standing based on a
5 dignitary harm under the establishment clause.

6 And one of the reasons why this comes up so often I
7 think in the creche cases and the cross cases and the public
8 display cases is because, to be honest, Your Honor -- and I'm
9 going use another semi-Jewish term here -- no state in the
10 country before has had the *chutzpah* to pass a statute that says
11 there's only these three religious beliefs and these three
12 religious beliefs are the preferred beliefs of the state of
13 Mississippi. The reason why you don't have standing -- we
14 can't given you a case showing that standing, there's no one
15 who's ever tried it before.

16 But under the establishment clause, if you have
17 standing to say -- if you have standing, for example, in the
18 Ninth Circuit to say that a resolution from the City of
19 San Francisco condemning the Catholic Church's position on gay
20 marriage, you have standing to challenge that, you have
21 standing to challenge this.

22 You have standing to challenge a state law that says
23 the state cannot ever consider sharia law and you're a Muslim
24 and the only real argument he has is that their sharia law
25 might be referenced in his will, you have standing to challenge

1 this. And if you have standing to challenge the seal of the
2 City of Austin that has a coat of arms with a cross in it
3 somewhere, clearly, you have standing to challenge HB 1523.

4 THE COURT: How many people see the seal every day?

5 MS. KAPLAN: That's exactly what the court said. I
6 don't even know where the seal of the City of Austin is --
7 comes up. I guess when they stamp documents. I don't know.
8 But the court made that very observation. These people see, to
9 use Your Honor's terms, they metaphorically see HB 1523 in
10 almost every asset of their day-to-day life. That has to
11 create standing under the establishment clause.

12 THE COURT: Thank you, Ms. Kaplan.

13 MR. McDUFF: Good morning, Your Honor.

14 THE COURT: Good morning.

15 ARGUMENT FOR THE BARBER PLAINTIFFS

16 MR. McDUFF: I'm not going to try to cover all of the
17 topics that we have briefed, but there are a couple of things
18 that I think are very important as we close out this hearing.

19 One of them came up in response to a question you
20 asked about the breadth of 1523. It has a wide breadth. It
21 prevents state officials from taking actions in a variety of
22 arenas where they otherwise might believe action should be
23 taken in the best interest of the people of the state.

24 I do not believe -- and I think this is important
25 because you may decide not to enjoin the statute. You may

1 enjoin the statute. The Fifth Circuit may lift your
2 injunction. Possibly -- we hope not, of course, but it's
3 always possible. If this law goes into effect, there are some
4 limits. And I do not believe it authorizes teachers to refuse
5 to teach your child. I do not believe it authorizes teachers
6 to talk down to a child, to kick a child out of a class because
7 he comes from a family with gay or lesbian parents. It does
8 authorize -- it does authorize people to refuse to counsel a
9 child. And that can be devastating.

10 The other problem with 1523, the biggest problem in my
11 view, is that it encourages people to discriminate. I mean,
12 you know, people out in the -- who are dealing with 1523,
13 they're not lawyers. They're not going to parse it like we
14 parse it. And so I can imagine there are some teachers who
15 think they don't have to teach a child or they can talk down to
16 a child or they can do what happened in Rankin County that was
17 talked about yesterday and tell the class that a child is --
18 comes from a -- not from a proper family. And state officials
19 who should be disciplining that teacher might believe they
20 can't because of 1523. 1523 sends a terrible, terrible
21 message. But even when you look at the confines of what it
22 specifically does allow and doesn't allow, it's very broad.

23 The most important thing about 1523, even if it had no
24 impact whatsoever, is that for both establishment clause
25 purposes and equal protection clause purposes it draws lines

1 that affect people's status in the community. And we've
2 discussed that thoroughly in our briefs. And irrespective of
3 the actual legal impact, the lines that are drawn that endorse
4 certain religious views and that treat some people unequally,
5 to grant privileges to some people and not to others, those
6 violate both the First and Fourteenth Amendments.

7 And what I really want to focus on in the time that I
8 have is the question of whether, as the State alleges, there is
9 a secular purpose to this statute and there is a -- and whether
10 the statute is a rational response to some legitimate
11 governmental problem or governmental interest, because those
12 overlap. It's important both to the First and the Fourteenth
13 Amendment issues.

14 And, you know, I was struck yesterday when the
15 colloquy was quoted between Senator Fillingane and Senator
16 Branning where Senator Fillingane said, *We are passing -- we*
17 *need to pass this bill to prevent reverse discrimination.* And
18 my question is, What reverse discrimination? In what way is
19 there anything in this record, anything in the legislative
20 discussion, anything in the reality of the way the world works
21 in this state in which straight people are being discriminated
22 against?

23 In what sense are people who believe in these views
24 that are endorsed by the statute that marriage should only be
25 between a man and a woman, in what way are they being

1 discriminated against? You know, the fact that a gay and
2 lesbian couple marries doesn't prevent a straight couple from
3 marrying. The fact that the people in the Joshua Generation
4 Metropolitan Community Church celebrate theologically weddings
5 of gay and lesbian people and straight people as well doesn't
6 prevent people in the Southern Baptist Church or the United
7 Methodist Church from holding their doctrines. And this notion
8 of somehow it is reverse discrimination is just -- you know,
9 it's just absurd.

10 And Senator Fillingane said, *Oh, we don't want to give*
11 *special rights to these people. And so in order to prevent*
12 *them from getting special rights, we're going to create special*
13 *rights for everybody who disagrees with them, who opposes them,*
14 *who has a religious view that what they are doing is wrong and*
15 *immoral.* It makes no sense.

16 And when you look at the question of what legitimate
17 interest is the state putting forward and you look at whether
18 there is any legitimate interest that is not already dealt with
19 by the RFRA statute, look at page 30, note 31 -- I'm going to
20 read it -- of their brief in opposition to our motion for
21 preliminary injunction. And it says, quote, *Obergefell*
22 *dramatically tilted the playing field against conscientious*
23 *objectors to same-sex marriage after the state RFRA was*
24 *adopted.*

25 That's the reason they say that RFRA is not

1 sufficient. That's like saying *Brown v. Board of Education*
2 tilted the playing field against white supremacists. It's like
3 saying it tilted the playing field against people who have
4 religious beliefs against racial integration. It's like saying
5 the 1964 Civil Rights Act and the 1965 Voting Rights Act and
6 the 1968 Fair Housing Act tilted the playing field against
7 people who don't believe in those -- in those, you know,
8 monumental changes in the law.

9 And so the fact that *Obergefell* -- *Obergefell* leveled
10 the playing field for purposes of marriage so that same-sex
11 couples can get married just like straight couples. And the
12 fact that that decision was issued in no way shows that RFRA is
13 inadequate. In fact, RFRA was passed in Mississippi in the
14 anticipation of the possibility of the *Obergefell* decision.
15 And there is nothing in the record, nothing in the record to
16 suggest that's not the case.

17 If you look at 1523, there's -- and whether it was
18 necessary, there's absolutely no evidence whatsoever of a
19 florist in Mississippi who has said, *Oh, my God, I was forced*
20 *to sell flowers to a lesbian couple that wanted to have a*
21 *wedding and it just ripped me apart spiritually.*

22 You know, it's been a year since -- *Obergefell* will be
23 one year old in two days. Okay? There is no evidence of a
24 spiritual crisis in Mississippi because people are getting
25 married. There is no evidence of somebody who has a plantation

1 house, antebellum plantation house, that they rent out for
2 weddings saying, *Oh, my God, my great-great-grandfather would*
3 *be turning over in his grave because some gay people wanted to*
4 *use my house as a way -- for a reception.*

5 There's no evidence of a circuit clerk saying, *You*
6 *know I had to go to church and pray for forgiveness because I*
7 *was in the office at the lunch hour by myself and I had to*
8 *issue a marriage license. None whatsoever. There is no*
9 *evidence of a church who had some property to sell and they*
10 *said, I was forced to sell it to a gay couple that was going to*
11 *get married, and it really violates all of my religious*
12 *beliefs.*

13 There is no -- this one is really -- is really -- I
14 think illustrates how silly and how unreasonable this bill is.
15 Section 3, subsection 4, 3(4), "The state government shall not
16 take any discriminatory action against a person on the basis
17 that the person declines to participate in the provision of
18 treatments related to sex reassignment or gender identity
19 transitioning, based upon a sincerely held religious belief or
20 moral conviction described in subsection 2." I mean, you would
21 think that the state is going to go be telling orthopedic
22 surgeons that they have got to do sex change operations.

23 I mean, you know, if I go to a doctor who tells me
24 that for, I don't know, whatever reason he doesn't heart
25 surgery and I need heart surgery and he says he's never done

1 heart surgery because he's got some religious objection to it
2 and, therefore, he's not going to do my heart surgery, I would
3 say, *Thank you for telling me*, and I'll go find somebody who
4 wants to do it and has experience.

5 And I would think that if somebody wants treatment
6 related to sex reassignment or gender-identity transitioning,
7 they are going to go to someone who has experience because that
8 person is willing to do it and wants to do it. And so the
9 notion that doctors are going to be sued because they won't do
10 gender-identity transitioning procedures is absurd.

11 There is no evidence that some state employee has been
12 fired because that person expressed during the lunch hour that,
13 you know, *Under my religious teachings, marriage is between a*
14 *man and a woman or I don't understand about this whole*
15 *gender-identity transition thing. That's against my religious*
16 *teachings*. No evidence of that yet whatsoever, yet we have a
17 provision that says you can't discriminate against people who
18 hold those beliefs.

19 THE COURT: Let me ask you this. I understand you're
20 pointing out the evidence that the State has not put out there,
21 but is there any evidence that there a person who has attempted
22 to go to the circuit clerk's office, get a marriage license and
23 be denied?

24 MR. McDUFF: I don't know the answer to that; but I
25 think, obviously, if that happens, a person can bring a

1 lawsuit. And if some circuit clerk says, *Well, you know, I was*
2 *the only one at lunch and that's why I didn't give it to you*
3 *because I have a religious belief and I'm sorry your license is*
4 *delayed, but this violates my religious beliefs,* and somebody
5 brings suit against that circuit clerk, that circuit clerk can
6 impose RFRA as a defense. It can be litigated in court.

7 THE COURT: Senator Fillingane says that *That's why we*
8 *wanted to embolden these deputy circuit clerks, so that they*
9 *won't have to give up their sincerely held religious views and*
10 *be forced to issue a marriage license to same-sex couples.*

11 MR. McDUFF: It's been a year since *Obergefell* was
12 decided, and I'm not aware and there's been nothing in the
13 record of this case or in the legislative debates about a
14 single circuit clerk who's had that problem. Now, maybe in the
15 circuit clerks they've worked it out and they said, *Look, I'm*
16 *not comfortable issuing marriage licenses. You deal with the*
17 *marriage licenses. I'll deal with the voter registration*
18 *applications.* But there is not a single instance of somebody
19 saying they had to violate their own religious beliefs.

20 If it happens and there's litigation over it, then --
21 I think Ms. Kaplan said it very well and I think it's clear,
22 all of this can be evaluated under the Religious Freedom
23 Restoration Act. You don't need a bill that endorses certain
24 specific religious beliefs and provides protection only to some
25 people.

1 THE COURT: There's statutes that -- there's different
2 statutes, I presume, that protect different things. And is
3 there anything wrong with the legislature -- yes, RFRA may be
4 sufficient, but what's wrong with adding another tool in
5 somebody's arsenal, if you will, to help them out? What's
6 wrong with enacting another statute that helps them even though
7 RFRA is there?

8 MR. McDUFF: Because it endorses religions, specific
9 religious beliefs, because it provides special protection to
10 the people holding those specific religious beliefs and because
11 it creates -- it provides special protection to people based
12 on -- and thereby gives unequal treatment to others because of
13 their views on a particular issue, and it also -- and I think
14 this is important -- it really demonizes certain groups of
15 people, specifically same-sex couples who are married or want
16 to marry, unmarried people engaged in sexual relations, and
17 transgender people, and specifically demonizes them and targets
18 them for unequal treatment.

19 And so I think it violates for those reasons the First
20 and Fourteenth Amendment. And I think that RFRA not only is
21 sufficient to handle it, but it does bring into play the
22 weighing of the burdens that are necessary to address these
23 issues in a constitutional fashion. And RFRA is -- to burden
24 someone's religion you have to prove under RFRA a -- that it is
25 the most narrowly tailored means of a compelling state

1 interest. That's a very difficult test to meet.

2 So you don't need additional protections that violate
3 the constitution and is not -- it's not a valid secular purpose
4 and it's not a rationally related legitimate government
5 interest to say you do need special protections so that you can
6 endorse these specific views and draw these lines that
7 otherwise violate the constitution.

8 I want to just talk about two other things related to
9 this bill that I think are very important. One of the
10 provisions says that the State cannot take discriminatory
11 action in foster placements, adoption placements on the basis
12 of a parent's or potential parent's sincerely held religious
13 beliefs. I'm not aware of any instance and there's none in the
14 record of the State taking a gay and lesbian child or
15 transgender child away from foster parents or adoptive parents
16 because of those parents' religious views.

17 I would hope that -- and what I think one of the
18 biggest concerns about 1523, I would hope that even if it does
19 go into effect, that people at the Department of Human Services
20 and the child welfare department will take those children away
21 if the parents, not in terms of their beliefs, but in their
22 actions are doing things that are not in the best interest of
23 that child and harm that child.

24 A great fear about 1523 is that it will embolden
25 foster parents to do those things and it will make DHS and

1 child welfare workers timid and afraid to take action in the
2 best interest of their child.

3 THE COURT: Let me ask you this, Mr. McDuff, because
4 that raises an interesting point about the parties in this
5 case. I just want to make sure, because part of the argument
6 of CSE I or, I don't know, reopening CSE I is who's a state
7 officer and all that? There's a transition that has occurred
8 with respect to the executive director's relationship with
9 who's over foster care now, I think.

10 MR. McDUFF: Right.

11 THE COURT: Justice Chandler is now -- so if we're
12 talking about foster care placement and stuff, I -- and I'm
13 going to ask the State this too because I want to make sure we
14 have the right parties in. Should Chandler be named a party
15 defendant in this case because there was special legislation or
16 something that --

17 MR. McDUFF: Not at this point.

18 THE COURT: Not at this point?

19 MR. McDUFF: The statute provides basically for a
20 two-year transition period.

21 THE COURT: Okay.

22 MR. McDUFF: Now, it can be escalated and the new
23 agency can move out from under DHS prior to that time. But I
24 think the absolute deadline, if I remember correctly, is
25 December 31, 2017. I actually researched this issue because I

1 was thinking about the same point you raise.

2 And it is my understanding the child welfare offices
3 are still under the purview of DHS at the time former Justice
4 Chandler and the director of DHS are supposed to develop a
5 plan. I don't know if they've developed it yet or not, a
6 transition plan; but the transition has not occurred yet. If
7 it does, of course, we can always add Justice Chandler --
8 former Justice Chandler, but it's not necessary because DHS
9 still has some responsibilities that are affected by this
10 statute and some -- and the main thing about the statute is it
11 prevents state officials from taking actions. And so,
12 therefore, the governor, the attorney general, the director of
13 DHS are all -- are all proper defendants because if this
14 statute is enjoined, they will have to be told they are no
15 longer bound by these restrictions; and, therefore, they are --
16 they are proper defendants here.

17 At any rate, what I'm saying is all of these concerns
18 and protections and whatnot that are given to these people on
19 the basis of their sincerely held religious beliefs, there's
20 simply been no evidence to show that this is a secular purpose,
21 that there's any need for this or that it is rationally related
22 to a legitimate government interest.

23 And for that reason, I just -- I think House Bill 1523
24 is a giant hoax. It is a problem. It's -- I'm sorry. It is a
25 solution in search of a problem that doesn't exist. And, you

1 know, the Supreme Court in the *Romer* decision said, "Laws of
2 the kind now before us raise the inevitable inference that the
3 disadvantage imposed is borne of animosity toward the class of
4 persons affected."

5 And given the fact that there is no need for this law,
6 given the fact that there is no problem that it addresses,
7 given the fact that there is no need for a solution because
8 there is no problem, I think the court can certainly draw the
9 conclusion that this law is based on animus to the people who
10 are targeted -- targeted by this bill.

11 And so, really, Your Honor, there are -- you know,
12 there are a number of other things that we have said in the
13 brief and a number of other things I would like to say at this
14 point, though, only really one more that I want to add, and
15 that is at page 16 of the brief, the defendants say none of the
16 plaintiffs allege that they have been denied anything.

17 And what they have been denied is equal status in the
18 eyes of the law by 1523. What they have been denied is equal
19 status in the eyes of the law for their religious beliefs. And
20 so we're not asking for special treatment. We're asking to
21 just go to the things they were -- the way they were in terms
22 of the areas covered by this law prior to House Bill 1523.
23 We're just asking the court -- and I think it is a very modest
24 request -- to maintain the status quo, prevent this statute
25 from going into effect while this case is resolved on the

1 merits.

2 And I want to conclude by quoting from the *Heckler v.*
3 *Mathews* case, which deals with equal protection and I think
4 standing. "The right to equal treatment guaranteed by the
5 constitution is not coextensive with any substantive rights to
6 the benefits denied the party discriminated against.

7 Rather" --

8 THE COURT: Slow down. Slow down. Slow down.

9 MR. McDUFF: -- "rather, as we have repeatedly
10 emphasized, discrimination itself by perpetuating archaic and
11 stereotypic notions or by stigmatizing members of the
12 disfavored group as innately inferior and, therefore, as less
13 worthy participants in the political community can cause
14 serious noneconomic injuries to those persons who are
15 personally denied equal treatment solely because of their
16 membership in a disfavored group.

17 "Accordingly, as Justice Brandeis explained, when the
18 right invoked is that of equal treatment, the appropriate
19 remedy is a mandate of equal treatment, a result that can be
20 accomplished by withdrawal of benefits from the favored class
21 as well as extension of benefits to the excluded class."

22 And even though this bill doesn't say anyone is
23 innately inferior, it certainly does stigmatize people and it
24 certainly provides benefits to the favored class, the people
25 who hold these specific religious views, beliefs or moral

1 convictions that it does not provide anyone else. So we're not
2 asking for special treatment. We're asking for equal treatment
3 of people, of their views, of their convictions and of their
4 religious beliefs.

5 And the final thing I want to say is, we talked
6 yesterday -- both Reverend Carol Burnett and Reverend Susan
7 Hrostowski talked about the fact that for people of faith, when
8 they are talking about these issues, their moral convictions
9 are the same as their religious beliefs. Their moral
10 convictions stem from their religious beliefs.

11 So when you're talking about religious beliefs and
12 moral convictions, they're really one and the same, and you
13 can't separate them out. And so I -- and that, by the way, is
14 borne out by the testimony of the witness this morning who said
15 only 13 percent of the people in Mississippi classify
16 themselves as nonreligious.

17 So for purposes of this statute, I think it is
18 governed in its entirety by the establishment clause. To the
19 extent any portion of it is not, it is governed by the equal
20 protection clause. And I do because -- you know, you are
21 always very thorough. And we have raised multiple claims here,
22 First Amendment and Fourteenth Amendment. We do think in the
23 event there is an appeal, that it will be necessary to have a
24 ruling from the court on both, and we do ask you to preserve
25 the status quo and prevent this unconstitutional bill from

1 taking effect and to create a situation where there is equal
2 treatment, not special treatment for certain people based on
3 their religious beliefs and their moral convictions.

4 THE COURT: Let me ask you this question. You raised
5 the word "animus." And, obviously, this is prefacing what
6 might come to the State, but -- and Ms. Kaplan talked about
7 context in the establishment clause thing. You've mentioned
8 animus for equal protection purposes, I think.

9 MR. McDUFF: Yes, sir.

10 THE COURT: There's a steady -- there's a truncated
11 timeline that one can look at, I think. There was a case out
12 of Hawaii that was the first one to acknowledge a right to
13 same-sex relationships and at some time -- at some point in
14 time -- maybe that's a referendum or something. Then there was
15 the Massachusetts case that really got the ball rolling, I
16 think --

17 MR. McDUFF: Yes, sir.

18 THE COURT: -- for states. And I think after that
19 case was announced, '94, '95, '96 or so, Mississippi then
20 adopted in 1997 a statute that prohibits same-sex marriages.
21 Again, it may be sort of shielding itself from what might come.

22 Then we had DOMA, the Defense of Marriage Act, which
23 was a response, I think, the court found in *Windsor* in setting
24 forth the timeline. The Defense of Marriage Act was passed,
25 and Mississippi then I believe in 2004 decided to amend its

1 constitution to strengthen its right to stave off future
2 same-sex marriages, I believe. You made a point about footnote
3 31 on page 30.

4 MR. McDUFF: Yes, sir.

5 THE COURT: The Supreme Court has now said *Obergefell*
6 is what the condition of the law of the land ought to be. And
7 I think you say that the State has at least said that one of
8 its reasons for it is a response to *Obergefell*. Could the
9 court look at those things and say that it is a basis in which
10 to prove or show animus?

11 MR. McDUFF: Yes. Yes. By the way, the State has not
12 said that *Obergefell* is one of the reasons. It says it's the
13 only reason. The only reason that they passed this bill, the
14 only reason that they say RFRA is not sufficient is because
15 *Obergefell*, quote, tilted the playing field. So that in and of
16 itself is ridiculous and is fallacious. It's is not a basis to
17 uphold this bill.

18 But I do think in analyzing animus you can as -- look
19 at this entire history of actions that were taken against gay
20 and lesbian people as you did in the CSE I case. It does
21 reflect an animus. And I think this is just a continuation of
22 that pattern. And every time these issues have gone to the
23 U.S. Supreme Court from *Romer*, to *Windsor* to *Obergefell*, the
24 court has concluded that there is an element of animus
25 involved. And the fact that special protections are set up for

1 these particular religious beliefs in House Bill 1523 is a
2 clear perpetuation of that pattern, and it's clearly
3 unconstitutional.

4 THE COURT: I know we have avoided talking about
5 *Loving* and all of that in the equal protection thing, and
6 that's fine; but if there was a -- if one of the -- the
7 same-sex marriage -- it says same-sex marriage and I think it
8 says sexual relations -- moral belief or sexual relations of
9 those who are not married. And maybe I should have asked the
10 experts this. And I don't know if there's any religion that
11 suggests that people ought to engage in intrafaith marriages
12 only, but if there were -- if one of the moral codes was no
13 interfaith marriages, could that survive an establishment
14 clause attack?

15 MR. McDUFF: No. No, I don't think so. I think
16 just -- just as a statute that said -- that provided special
17 protections to people who on religious grounds oppose
18 interracial marriage, I think a statute saying that we are
19 building special protections for people who oppose interfaith
20 marriages would be equally flawed and equally unconstitutional.

21 THE COURT: Thank you, Mr. McDuff.

22 MR. McDUFF: Thank you.

23 THE COURT: The court is going to take a ten-minute
24 recess for the court reporter, primarily, I mean, you know, and
25 then we'll be back. Court's in recess.

1 (Recess)

2 THE COURT: Are we ready for the State?

3 MR. BARNES: We are, Your Honor.

4 THE COURT: Okay. Let me throw a curve at you real
5 quick, Mr. Barnes. We've talked about in the -- off the record
6 and also on the record about the motion to consolidate, and
7 I've heard all of your arguments with respect to whether or not
8 these cases ought not -- why these cases should not be
9 consolidated.

10 Is there any reason at this point -- I know we
11 consolidated them for hearing purposes, and I think I
12 ordered -- basically said that we would probably take this
13 matter back up and all that. But is there any reason at this
14 point why these cases should not be consolidated from this
15 point forward on all issues if this matter were to continue to
16 a trial on the merits? It seems like the issues are quite
17 similar.

18 Is there -- so I'm asking the State now. Is there --
19 and we could do it on the back end of the other argument, but I
20 was thinking about the earlier consolidation issues and the
21 objections that the State had, and I said we would do it for
22 hearing purposes only.

23 But now that the hearing has been fleshed out and
24 everybody has had their opportunity, if the court denies the
25 temporary -- the preliminary injunction, then this matter would

1 proceed to discovery, trial, all of that and if the court
2 grants it or whatever. But, still, whenever it is all heard,
3 it's going to be heard. And can they be heard together? Would
4 any party be prejudiced by having these cases combined?

5 MR. BARNES: Well, Your Honor, I consider myself more
6 of a fast ball hitter. So could I have just a moment to
7 consult with my colleagues?

8 THE COURT: Okay.

9 MR. BARNES: Though I would say that on the front end
10 the injury to the State and the damage and the prejudice that
11 has occurred did relate or certainly occurred leading up to
12 this hearing, but -- so we still object to consolidation on
13 that ground and we -- you know, I think we adequately reserved
14 those objections on the record. So we still object. But give
15 me just a moment.

16 THE COURT: Okay. Thank you, Mr. Barnes.

17 (Short Pause)

18 MR. BARNES: And we have a consensus, Your Honor.
19 We're not saying no definitively today, but we would like the
20 opportunity to consult and consider in detail because, quite
21 honestly, you know, I've got a lot of things that the other
22 side has given me to think about, and that was not on the
23 forefront --

24 THE COURT: Okay.

25 MR. BARNES: -- of our minds.

1 THE COURT: Okay.

2 MR. BARNES: May it please the court.

3 THE COURT: You may proceed.

4 ARGUMENT FOR DEFENDANTS HOOD AND MOULDER

5 MR. BARNES: Your Honor, I'd like to start by

6 answering the question that you asked I believe Mr. McDuff, and
7 the answer is there's no evidence that anyone has been denied a
8 marriage license since *Obergefell*. There's no evidence in
9 the -- at least in this record and none that I'm aware of that
10 anyone has been denied a marriage license or that it's been
11 impeded, that a marriage license has been delayed. There's no
12 evidence that anyone has recused themselves. So to answer that
13 question, the answer is, no, there's no evidence of that.

14 Like Ms. Kaplan, I'd like to start by reading from a
15 Supreme Court case. And I guess to the extent that it's been
16 characterized as absurd, we're at least in good company because
17 this comes from Chief Justice Roberts, his dissent in
18 *Obergefell*.

19 "Today's decision, for example, creates serious
20 questions about religious liberty. Many good and decent people
21 oppose same-sex marriage as a tenet of faith, and their freedom
22 to exercise religion is unlike the right imagined by the
23 majority actually spelled out in the constitution. Respect for
24 sincere religious conviction has led voters and legislators in
25 every state that has adopted same-sex marriage democratically

1 to include accommodations for religious practice. The
2 majority's decision imposing same-sex marriage cannot, of
3 course, create any such accommodations.

4 "The majority graciously suggests that religious
5 believers may continue to advocate and teach their views of
6 marriage. The First Amendment guarantees, however, the freedom
7 to exercise religious. Ominously, that's not a word the
8 majority uses. Hard questions arise when people of faith
9 exercise religion in ways that may be seen to conflict with the
10 new right to same-sex marriage."

11 Skipping a few sentences, "There's little doubt that
12 these and similar situations" -- "similar questions will soon
13 be before this court. Unfortunately, people of faith can take
14 no comfort in the treatment they receive from the majority
15 today."

16 THE COURT: How are people in Mississippi being
17 prohibited from exercising their religion? If you look at what
18 Chief Justice Roberts said, "teach," I believe, or "exercise,"
19 how -- well, no, no. I think it's Justice Kennedy in
20 *Obergefell* talks about teaching; justice Roberts emphasizing
21 exercise.

22 How are the people in Mississippi being prohibited
23 from exercising their religion if their religion tells them
24 they don't have to participate in a same-sex wedding, they
25 don't have to officiate over a same-sex wedding? That law --

1 nothing about the law has changed that. So how are people
2 being prohibited from exercising their religious?

3 MR. BARNES: Well, to start with, I guess the clerk
4 provision is a good example. HB 1523 gives clerks the right to
5 recuse themselves in that situation. And their right to free
6 exercise is violated when a clerk is required to issue a
7 marriage license that conflicts with their sincerely held
8 religious beliefs. And HB 1523 attempts to provide a solution
9 to provide a mechanism whereby both the rights of the person
10 seeking the license and the religious beliefs of the clerk may
11 be accommodated.

12 THE COURT: Isn't the government required to provide
13 access to public benefits, public resources, i.e., a public
14 license on the same terms and conditions to each of its
15 citizens and no clerk should be able to withhold a benefit, a
16 resource, a document to a citizen who pays taxes like everybody
17 else on -- on different terms and conditions?

18 I mean, you know, I'm -- the condition here that a
19 clerk faces, for example, in this context is a same-sex couple.
20 So are they allowed to trump or minimize the dignity of those
21 who are in same-sex relationships just because their religion
22 tells them to?

23 MR. BARNES: No, Your Honor, and that's not what HB
24 1523 does, and it doesn't purport to do any of those things. A
25 clerk who simply recuses himself and says, *Bob, is going to*

1 *help you or says, I'm recusing myself, but we've got somebody*
2 *in my office who is going to provide this to you, that's a*
3 *minimal affront I would say to anyone there as far as any*
4 *stigmatic injury when no one is going to be denied that.*

5 *And I think it's important to look at the situation in*
6 *Kentucky where you had a clerk that not only said, I'm not*
7 *going to give any licenses, she actively attempted, according*
8 *to the record, you know, to prevent her clerks, her deputies,*
9 *from assisting people from obtaining same-sex marriage*
10 *licenses. And the solution crafted by the district court in*
11 *the Kentucky case was, All right. You step aside. Your*
12 *deputies will issue licenses. And as long as that happens,*
13 *that's fine.*

14 *That accommodation, at least to some extent, you know,*
15 *it did allow her to not personally issue the license; but it*
16 *also at the same time provided that a deputy would. And*
17 *HB 1523 does exactly the same thing when it says that -- let me*
18 *quote it because I don't want to -- I don't want to misquote*
19 *the statute. And we've all talked about it. When it says in*
20 *Section-- I believe it's 3 -- I'll get there, Your Honor. I*
21 *apologize.*

22 *THE COURT: No problem.*

23 *MR. BARNES: Oh, okay. And, again, a little bit of*
24 *confusion because the act, you know, has the bold sections and*
25 *then it also has a lot of subsections and there's repetition.*

1 But it's in Section 3(a), and that's bold Section 3,
2 Provision (a). As far as clerks are concerned, "The person who
3 is recusing himself or herself shall -- shall take all
4 necessary steps to ensure that the authorization and licensing
5 of any legally valid marriage is not impeded or delayed as a
6 result of any recusal. If a clerk --"

7 THE COURT: One of the things that came up the other
8 day in our argument, "clerk," who does that speak to? Is that
9 the clerk who's elected and holds the office or is that the
10 deputy clerk or the deputy deputy clerk or the clerk to the 1.0
11 or 0.1 degree? I mean, is it the clerk, the county clerk, the
12 elected clerk, or is it the person who is recusing? Because
13 that could be 18 different people, theoretically.

14 MR. BARNES: Well, your Honor, all I can say is that
15 HB 1523 places that burden on the person who is recusing
16 himself or herself.

17 THE COURT: Okay. So that gets me to the point. The
18 circuit clerk recuses, appoints a deputy clerk to do it. That
19 deputy clerk, as I asked the State the other day, goes to the
20 same church, same Sunday school class as this person here, and
21 they have the same sincerely held religious belief, and it goes
22 down to the next person, the next person, the next person to
23 the next person ad infinitum. There's no guarantee that you'll
24 be able to find someone. Right? Does the law allow persons to
25 be specially designated who are not employed by that office?

1 MR. BARNES: Your Honor, the law -- the law doesn't
2 contemplate that; but the simple answer is, if they're going to
3 claim the protections of HB 1523, they have to fulfill this
4 requirement that they take all steps necessary.

5 THE COURT: I understand if they want to claim the
6 protections, but the protections -- what does one -- I mean,
7 the protections. So --

8 MR. BARNES: So I think the answer is, Your Honor, if
9 they cannot ensure -- I think they would have to issue the
10 license.

11 THE COURT: So you would force someone who cannot --
12 if they have sincerely held beliefs, just because they can't
13 find somebody to issue the license, that they must set aside
14 their sincerely held religious views and issue the license.

15 MR. BARNES: I think that that highly hypothetical
16 conjectural situation might arise. I'm not -- but I -- we
17 haven't seen any evidence that that's the case or that it could
18 be the case because -- again, back to Kentucky. You had the
19 clerk, the head clerk, said, *I'm not doing it*. I believe she
20 had six or seven deputies. They all said, *We'll give the*
21 *licenses*.

22 So I guess that situation is just so far down the
23 road, Your Honor, that it's not a type -- it's not an imminent
24 and concrete harm that's likely to occur just because 1523 goes
25 into effect.

1 THE COURT: You may proceed.

2 MR. BARNES: Thank you, Your Honor. Nothing in the
3 text of 1523 purports to immunize any violation of federal law.
4 It doesn't say it in the text. It doesn't purport to do that.
5 And, in fact, it, again, requires that the person recusing take
6 all steps necessary.

7 Another point about 1523 is in Section 8 --

8 THE COURT: Does it close off the courthouses, the
9 state courts, to those who --

10 MR. BARNES: No, Your Honor. And I should have said
11 maybe that overreaching is a theme that I was hoping to play
12 on, because I heard a lot of extremely expansive descriptions
13 of what 1523 could lead to, and I have a very difficult time
14 connecting those with the text of this bill. And one of the
15 things that people -- a state court would be required to deny
16 someone access as part -- like a 1983 lawsuit. I just -- I
17 don't see that as being a credible possibility.

18 THE COURT: Does one have a right under state law,
19 though, to seek a remedy for every wrong done to him? And is
20 that remedy or is that avenue to a remedy foreclosed by 1523
21 under state law? Are the courthouse doors open to those who
22 invoke the provisions or whatever to 1523?

23 MR. BARNES: I think they are, Your Honor. I think
24 that they are open. And I think the first thing about it is
25 that this law is not about general situations that just come up

1 that have something to do with the same-sex married couples.

2 This law is about the provision of marriage or events
3 related to the provision of marriage, which is why -- I
4 appreciated Mr. McDuff acknowledging, I mean, the idea that
5 this could apply in a school situation. That's -- we don't --
6 I agree with Mr. McDuff. We don't think that it goes there,
7 and schools are a special situation.

8 By the same token, we think that the extremely,
9 extremely broad interpretation being placed on this counselor
10 provision takes it out of context and it's cherrypicking. I
11 mean, that provision says, "The state government shall not take
12 any discriminatory action against a person" --

13 THE COURT: Slow down and direct me to the specific
14 portion.

15 MR. BARNES: I apologize, Your Honor. It is in
16 Section 3(4). And it reads -- and I will try to slow down for
17 the court reporter. "The state government shall not take any
18 discriminatory action against a person, wholly or partially, on
19 the basis that the person declines to participate in the
20 provision of treatments, counseling, or surgeries related to
21 sex reassignment or gender-identity transitioning or declines
22 to participate in the provision of psychological counseling or
23 fertility services based upon a sincerely held religious belief
24 or moral conviction described."

25 Now, they've taken the sentence "psychological

1 counseling or fertility services" out of context.

2 THE COURT: What type -- it says "provision of
3 treatments."

4 MR. BARNES: Right.

5 THE COURT: "Treatments," comma, "counseling." So any
6 kind of treatment, I presume, if one objects to providing
7 treatment because of your religious views, you're fine.
8 Counseling. It doesn't say -- that's why I asked about school
9 systems, because it doesn't say what type of counseling. Is
10 counseling -- I mean, is it psychological counseling? I assume
11 it includes marriage counseling. I don't know.

12 MR. BARNES: Your Honor, it's counseling that related
13 to sex reassignment or gender-identity transitioning. It's
14 just a continuation of the same sentence. That's why I was
15 saying it is taken out of context. If you read the provision
16 as a whole, it relates to treatments, counseling, or surgeries
17 related to sex reassignment or gender-identity transitioning or
18 declines to participate in psychological counseling, fertility
19 services. So we think that it's taken -- that's just an
20 extremely broad expansion.

21 And I guess the other thing is we're talking about a
22 situation -- there's no proof of that happening. There's no
23 proof in this record. There's no evidence that anyone is going
24 to be denied counseling services. First of all, you've got the
25 issue that 1523 -- and I apologize. Let me slow down. 1523

1 doesn't bar any counselor from providing any counseling or any
2 other type of professional from doing exactly what their
3 personal sense of ethics and their personal professionalism as
4 a counselor requires them to do. Nothing in 1523 tells a
5 counselor, *You cannot provide this counseling.*

6 1523, the title is Protecting -- in Section 1,
7 "Protecting Freedom of Conscience from Government
8 Discrimination Act." Plaintiffs have thrown around the phrase
9 "preferred religious beliefs" a lot. You're not going to find
10 that in the text. The act does say, "Sincerely held religious
11 beliefs or moral convictions protected by this act are the
12 belief or conviction that," and it proceeds to include that
13 cluster of three beliefs, "marriage... recognized as the union
14 of one man and one woman; sexual relations are properly
15 reserved to such marriage; and male (man) or female (woman)
16 refer to an individual's immutable biological sex as
17 objectively determined by anatomy and genetics at time of
18 birth."

19 Now, I believe I heard Professor NeJaime say that that
20 is a cluster of beliefs, that it's not -- you don't pull them
21 out, but those are generally considered to be together. And,
22 now -- and the provision I meant -- I was trying to get to to
23 emphasize, Your Honor, was Section 8 of 1523 says, "This act
24 shall be construed in favor of a broad protection of free
25 exercise of religious belief and moral convictions to the

1 maximum extent permitted by the state and federal
2 constitutions."

3 So by including that language, the legislature is
4 saying, to the extent that this law violated the federal
5 constitution, we recognize it would be invalid. Moreover, to
6 the extent, even though this law doesn't have a specific
7 severability provision in it, as the court's well aware,
8 Mississippi -- the Mississippi Code includes a general
9 severability provision which is incorporated into every law
10 whether or not it's specifically mentioned or not.

11 By protecting these three particular beliefs, 1523
12 does not say there are not other beliefs which are worthy of
13 protection. It does not say these are the only beliefs that
14 are worthy of protection. I know plaintiffs' position is
15 that's the message that it sends. That's the message that it
16 sends. But that is not what it says.

17 And one of the most important distinctions between
18 some of the cases relied on by plaintiffs is the fact that in
19 those cases, you had laws that specifically said Muslims are
20 disfavored; the Catholic Church is disfavored. For example, in
21 *Awad*, the constitutional amendment in Oklahoma specifically
22 said sharia law can't be considered by the courts in Oklahoma.

23 Sharia law is specific and integral to the Muslim
24 faith. That law specifically denigrated Mr. Awad's personal
25 religion, specifically said it cannot be considered. That

1 would be like a law saying the Ten Commandments can be
2 considered by a court and -- well, as Justice O'Connor pointed
3 out, *Well, you know, Ten Commandments says, Thou shalt not*
4 *kill; but that doesn't me you can't have laws against murder.*

5 And in *Harris v. McRae* when the court said, you know,
6 many religions say stealing is wrong, but that doesn't mean
7 that the court violates -- I mean that the government violates
8 the establishment clause when you have a law against larceny.
9 So those laws specifically denigrate. That law specifically
10 denigrated. In the --

11 THE COURT: So what is the secular purpose of this
12 law? Does it have to be a -- let me rephrase that. Because
13 these plaintiffs have brought an establishment clause attack on
14 the law, do we have to find that there's a secular purpose or
15 do you rest on -- what is the secular purpose behind had law?

16 MR. BARNES: Well, protection of free exercise of
17 freedom of conscience is a secular purpose. That's the same
18 secular purpose that's behind all of the RFRAs, federal and
19 state.

20 THE COURT: What does this law do that Mississippi's
21 existing RFRA law does not do?

22 MR. BARNES: Well, you know, that's a little
23 interesting, Your Honor, because, as I believe Mr. McDuff
24 mentioned in his argument, you know, at the time that the state
25 RFRA was filed, it was -- it was considered to be intended to

1 be discriminatory against same-sex marriage rights. And there
2 was I think a pretty good bit of hoopla about it.

3 But now the plaintiffs are saying pretty much that,
4 *Well, state RFRA law is great. It provides all the protection*
5 *that you would ever need. Well, that doesn't mean that*
6 *tomorrow or next week that somebody else is not going to file a*
7 *challenge to the state RFRA law and say, This is*
8 *unconstitutional.*

9 And, certainly, I think you could reasonably
10 anticipate a situation where if someone -- whether HB 1523 goes
11 into effect or not, a person goes and is denied service, denied
12 renting a facility or a wedding cake and they, you know, try to
13 defend on the basis of state RFRA, well, the first thing is
14 they probably would be sued in federal court, but -- and we'd
15 be right back here with a lot of the same faces and Your Honor
16 would probably be telling them, *Well, you know, whatever that*
17 *does as a matter of state court, that certainly -- that doesn't*
18 *touch the federal constitution. It doesn't affect religious*
19 *rights.*

20 So the fact that they are not choosing to challenge
21 state RFRA today doesn't mean that they may not challenge it
22 and try to strike -- you know, struck down tomorrow because --
23 and Mr. Goodwin is going to speak to the *Romer* issues directly.

24 But, you know, Mr. McDuff made a big deal about the
25 fact that -- he said, *Look, there's no evidence that this is*

1 *happening to anyone. There's no evidence that these people are*
2 *doing it, but that's because there is no law in effect in most*
3 *of the state that would permit those things to happen. But*
4 *that appears to be the type of situation that the plaintiffs*
5 *want and where someone could be disciplined for acting contrary*
6 *to their beliefs.*

7 *So in *Obergefell* --*

8 THE COURT: I mean, we do recognize that you were
9 quoting from Chief Justice Roberts decision, and it's --

10 MR. BARNES: It was in the dissent.

11 THE COURT: -- it was in the dissent.

12 MR. BARNES: It is a dissent. Absolutely, Your Honor.
13 It's not controlling, but it's just foreshadowing the situation
14 we're in.

15 THE COURT: Well, this issue of protecting freedom of
16 conscience from government discrimination, I guess that leads
17 to the question, how has the government been discriminating
18 against those who are in opposite-sex relations, those who only
19 engage in sexual relations within the marriage confines?
20 Turning the moral things on its -- looking at the mirror
21 opposite, this is protecting freedom of conscience from
22 discrimination -- from government discrimination.

23 So tell me how the legislature thought that the
24 government had been discriminating against those who -- I guess
25 don't have these moral codes, I guess.

1 MR. BARNES: Of course, nothing in 1523 says they
2 can't hold whatever moral codes and live by whatever code they
3 wish. But I think the answer is that after *Obergefell*, whether
4 plaintiffs consider it to be rational or reasonable or not,
5 just like the chief justice and the three -- well, the four
6 dissenters at the time, you know, recognized the serious
7 conflict between -- potential serious conflict between same-sex
8 marriage rights and free exercise of religion and I guess
9 actually, technically, all nine members of the Supreme Court
10 unanimously recognized that there was an issue with that
11 intersection, because the majority, Justice Kennedy said it,
12 and then the dissenters did and, of course -- and I believe it
13 was Justice Smith in the Fifth Circuit order also foreshadowed
14 this, but that in that context after *Obergefell*, citizens who
15 hold the beliefs that are protected by 1523 were effectively
16 told by the U.S. Supreme Court, *Your beliefs are garbage*.

17 THE COURT: I mean, is it any different, though -- and
18 I don't want to sort of try to elevate anything, race in this
19 here, but 1967 there was *Loving*. The Supreme Court spoke -- I
20 think it was *Loving*. I think it was '67 -- spoke. Now, if the
21 state in response to *Loving* filed a brief that says that, *Now*
22 *we have pushed down to the clerks the issuing of licenses.*
23 *It's not going to be issued by the state anymore. It's going*
24 *to be issued by the clerk. We have amended our statute. And*
25 *not only that, we've amend it, and we allowed these clerks to*

1 use their strongly held religious views to withhold granting a
2 license that the Supreme Court -- to the marriage of
3 interracial couples -- the Supreme Court did that. Some states
4 had laws on their book that says, *We won't acknowledge them.*
5 Same way as *Obergefell*. Now the Supreme Court has spoken.

6 What's the difference if the State had gone back and
7 created or devised a mechanism that allowed clerks to withhold
8 granting of a marriage license to those of opposite races or
9 opposite faiths, is one thing that I asked Mr. McDuff. Doesn't
10 that -- I mean, does that pass the smell test?

11 MR. BARNES: Well, the first answer, of course, Your
12 Honor, is that it didn't happen, thank goodness. But in
13 *Loving* --

14 THE COURT: But things did happen -- again, I don't
15 want to mix up, because I do -- I don't want to mix up race
16 stuff, because things did happen; and the State moved mighty,
17 mighty slow on doing things, creating barriers, creating --
18 doing things with -- in all deliberate speed, if I will -- if
19 you may.

20 MR. BARNES: And, Your Honor, you just hit on the
21 difference. When the Supreme Court in *Brown* concluded that
22 with all deliberate speed, that language, you know, enabled a
23 whole lot of lengthy and contentious issues.

24 And I agree. I would rather not dwell on that aspect
25 of our state's history; but in *Loving*, the difference, as I

1 understand it is -- well, first of all, the Supreme Court
2 didn't say like it did in *Obergefell*, And, oh by the way, there
3 are many, you know, people who hold sincerely held religious
4 beliefs and moral convictions that white supremacy is the way
5 it is. I'm saying they weren't, but I'm saying the court
6 didn't say, That is a potential intersection we have to be
7 concerned with and -- because in *Obergefell*, the majority says,
8 *You've got rights protected by the Fourteenth Amendment; you've*
9 *got rights protected by the First Amendment*, same thing Justice
10 Roberts said. So to me, that is the distinction is that you're
11 not dealing with a situation that the Supreme Court recognized
12 and --

13 THE COURT: Well, one --

14 MR. BARNES: The racism is not --

15 THE COURT: Well, one distinction may be is that
16 obviously there are a lot economic consequences to sort of
17 forcing people to change their school districts overnight,
18 build new schools and all of that.

19 A matter of issuing a license, you don't need all
20 deliberate speed. It's just a matter of changing a form either
21 from husband and wife to spouse to spouse or spouse one to
22 spouse two and issuing it. So that may be one distinction.

23 MR. BARNES: And I appreciate you offering me that
24 distinction, Your Honor. I certainly agree, of course, just
25 like all you have to do is issue a license, all you have to do

1 is step aside and let the next clerk issue a license. That's
2 just as easy.

3 And again, though, I think we've gotten a little far
4 afield. And the point I was trying to make about *Obergefell*
5 was that at that point people who hold the beliefs that are
6 protected -- described as protected in HB 1523, they felt
7 denigrated. They felt disfavored. And the Mississippi
8 legislature did react to *Obergefell*, but it didn't react to
9 *Obergefell* by saying, *No, no, no, we're going to bar it this*
10 *way. We're going to bar it that way. We're going to prevent*
11 *it this way.*

12 HB 1523 focuses on the people who are protected and --

13 THE COURT: Can one who has sincerely held religious
14 beliefs -- and I don't know if there's a person out there who
15 does through a religion have sincerely held religious views
16 against opposite-sex marriages; and if they do, does that
17 statute protect that person?

18 MR. BARNES: I'm trying to parse it out, Your Honor.
19 I haven't considered that. Based on the text of the act, I'd
20 would say, no, Your Honor. I'd say that as far as I can read
21 the text, it does not specifically do that. But I have not,
22 you know, fully analyzed that question. I apologize, but
23 the --

24 THE COURT: Does it -- in giving the right of an
25 individual to determine which marriages or which -- well, the

1 right to pick and choose which types of marriages that they
2 will not recognize based on their sincerely held religious
3 belief, does that in and of itself establish a religion under
4 the First Amendment?

5 MR. BARNES: We don't think it does, Your Honor. And
6 because -- first of all, the first story -- the first argument
7 we heard was *This is sectarian. This is Baptist versus*
8 *Methodist, Methodist versus Catholic.* The evidence shows
9 that's not true because there are some churches specifically
10 have doctrinal preferences or commands about same-sex marriage;
11 there are others who do not. But all the evidence shows that
12 regardless of what those churches officially say, the members
13 actually believe whatever they want to believe.

14 So the closest example is the abortion context and
15 which is why we discussed the Church Amendment and the Hyde
16 Amendment, which came later and was addressed in *Harris v.*
17 *McRae.* And as the court's well aware, *Roe v. Wade* was a kind
18 of a social upheaval case which changed the playing field.
19 Prior to *Roe*, states had laws that said conducting -- some
20 states had laws that said conducting an abortion is a crime.
21 When the Supreme Court said in *Roe* a woman has a right to
22 choose whether or not to have an abortion, well, that took that
23 out of the question.

24 So when you look at the Church Amendment, the question
25 is: Who was Congress intended to protect? Plaintiffs say,

1 *Well, it protects both sides. It protects both the person who*
2 *does abortions, and it protects the person who doesn't perform*
3 *abortions. And it is true that the Church Amendment does*
4 *include language that specifically says that with regards to*
5 *employment matters and discrimination regarding privileges that*
6 *entities can't -- receiving public money can't discriminate*
7 *whether somebody has performed abortions based on sincerely*
8 *held religious beliefs or has sincerely held religious beliefs*
9 *that prevent them from performing abortions.*

10 But after -- but it -- the section before that
11 contains a provision that is specific to people who oppose
12 abortion, and it reads -- it's in our brief -- "The government
13 cannot require such individual to perform or assist in the
14 performance of any sterilization procedure or abortion if his
15 performance or assistance in the performance of such procedure
16 or abortion would be contrary to his religious beliefs or moral
17 convictions." So the Church Amendment says you cannot force
18 that person, that health care worker, to act against their
19 beliefs.

20 And I've been trying to come up with a situation where
21 other doctors would need protection. But, candidly, I think
22 the section relied on by plaintiffs, again even though it lists
23 both, that preceding section shows who Congress was trying to
24 protect: The person who had religious beliefs that prevented
25 them from performing abortion. And the Church Amendment was

1 held constitutional by the Ninth Circuit -- I believe it was
2 the *Chrisman* case. I'm not -- I believe Mr. Miracle cited it
3 in his brief; I don't know that we did. But in 1974, I
4 believe, the Ninth Circuit said, *Church Amendment is*
5 *constitutional.*

6 And then followup, you had the Hyde Amendment which
7 said, you know, *The government can prohibit the use of public*
8 *funds for performing abortion.* And the argument raised was,
9 *But wait, wait. Look, opposition to abortion,* as it was
10 perceived at that time, they said, *That's the Catholic church*
11 *talking.* The Hyde Amendment simply incorporates the official
12 position of the Roman Catholic Church as to when life begins
13 and that abortion is a sin, and the Supreme Court in *Harris v.*
14 *McRae* said, *This does not violate the establishment clause.*

15 So is it very rare that you have a situation where a
16 law like this can survive constitutional scrutiny? I think it
17 is. I think this is like the situation right after *Roe*, just
18 one of those special situations.

19 Your Honor, I apologize -- and Mr. Miracle has to have
20 time and Mr. Goodwin. There was so much to respond to, but I
21 would like make a few points.

22 The school cases. Plaintiffs rely on a lot of school
23 prayer cases, a lot of moment of silence cases, a lot of forced
24 to say an oath that uses the words "under God" in them. Your
25 Honor, public -- schools are a totally separate. There are a

1 special context. The Supreme Court has recognized that many
2 times that the schools, you're dealing with impressionable
3 young people who are particularly open to the coercive effects
4 of perceived endorsement of religion.

5 THE COURT: How coercive is a moment of silence? A
6 teacher walks into the room and just say, *Let's be quiet here*
7 *for about 30 seconds. Y'all think about what you want to do*
8 *during that 30 seconds.*

9 MR. BARNES: Well, Your Honor, you know, I think --
10 I'm thinking back to something that Ms. Kaplan started off by
11 saying, *We think this is an easy establishment clause case,* and
12 I had to think -- I don't think there's any easy establishment
13 clause cases personally because if there were, *Engel v. Vitale*
14 would have ended the school prayer debate, and it did not,
15 which is shown by how many school prayer and moment of silence
16 cases there are. And in some of those cases, the Supreme Court
17 said this moment of silence --

18 THE COURT: If this court enjoins the state on this --
19 if the court enjoins this statute, what prevents the State from
20 coming back trying to find another way to do exactly what it
21 did this time? They were -- *Obergefell* came down. *Obergefell*
22 says, *Recognize these people in all the dignity and all the*
23 *liberty.* Justice Kennedy's opinion was rather broad and
24 expansive, if one wants to read it that way, despite
25 probably -- and that's probably why the four dissenters

1 attacked it in the way that they did. Maybe. But it talked
2 about dignity and liberty, as one of the dissenters said,
3 without citing anything with respect to the law.

4 So what would prevent the State of Mississippi from
5 doing what I call the whack-a-mole theory? You knock down one,
6 and you come up with another, and then we will be in litigation
7 again. And you would have thought that *Obergefell* was the end
8 of the story, the progression with *Romer*, with *Windsor*,
9 *Obergefell*, you would have thought that was the end of the
10 story, but it's not.

11 MR. BARNES: And like *Roe*, you would have thought that
12 that would have ended the situation, but it sure didn't. So I
13 guess the answer is based on the fact that we live in a
14 democracy where legislatures -- and policy decisions like this
15 are specifically, you know, within the purview of legislators,
16 there's always going to be the chances that may occur.

17 But I think you have to look at each of those
18 situations -- to some extent you have to look at the law that
19 is passed, make a decision on the basis of that law. If this
20 court were to enjoin 1523 and state its reasons, certainly --
21 speculating, but certainly people could take that decision -- a
22 legislature could conceivable take that decision and say, *Well,*
23 *this is what Justice Reeves says is wrong were the law so --*

24 THE COURT: No, no, not Justice Reeves. Come on, now.
25 Let the transcript reflect not Justice Reeves.

1 MR. BARNES: Judge Reeves. I was not trying to be
2 clever. It just slipped out. I think the school case is a
3 specific context, and I guess the legislative process lends
4 itself to the fact just like you can't resolve moment of
5 silence one and for all or abortion once and for all, that
6 there's always that possibility.

7 There was a lot of these really hypothetical
8 situations that the testimony went to, and there's just a few
9 of them I'd like to hit on. Ms. Garner and the connection
10 between the AIDS treatment and HB 1523, we don't understand
11 that connection. We think that's much too attenuated.

12 I mean, you're supposed to be able to connect anybody
13 in the world to Kevin Bacon with like six degrees of
14 separation, and you have to go a lot of steps there. I heard
15 one of my colleagues refer to it as the "Three Ifs Rule." If
16 you've got to the say, *If this happens and if this happens and*
17 *if this happens*, that's it. If you have to go one more, then
18 you've got a situation where you don't have a concrete and
19 particularized injury.

20 Also we do not dispute that all the testimony offered
21 by the plaintiffs concerning how HB 1523 makes them feel was
22 not their sincere subjective beliefs about HB 1523. That is
23 the way that it made them feel. But the evidence that that was
24 the intent of 1523 is missing. And if you read -- when you
25 look through the history, first of all, yes, the court can

1 consider legislative history, especially on purpose of passing
2 a statute. But that's only part of the question.

3 And an unofficial transcript of a floor debate is just
4 the tip of the iceberg, and it is true that we can never know
5 all the things considered by the legislature, what the
6 neighbor -- one legislator leaned over and said to the other.
7 And so, yes, the court can consider it, but it's not
8 dispositive.

9 The religious symbol cases, I would just like to
10 mention that specifically. Those cases don't say the existence
11 out there of a law means that anybody who knows about the
12 existence of that law has standing. They just don't. And
13 those laws do emphasize -- you have a physical symbol, a
14 reminder, which carries weight across a menorah, a Star of
15 David, that gives -- it's at the heart of those cases.

16 And we think those -- they are distinguishable. They
17 just are distinguishable. Rolling those over from the cross,
18 menorah, creche thing to an abstract feeling about a law is a
19 stretch. It just goes farther -- it certainly goes farther
20 than the Supreme Court has gone. I believe it goes farther
21 than the Fifth Circuit has gone.

22 You restaurant hypothetical to me illustrated kind of
23 the hypothetical impact. You say, *How would they know -- how*
24 *would somebody, a restaurateur, know that a couple was a*
25 *same-sex couple and therefore discriminate?* And Ms. Kaplan's

1 response was, *Well, when they see two women together, they*
2 *assume they are lesbian.* Well, that's an assumption on
3 Ms. Kaplan's part.

4 THE COURT: But is it okay for the government to
5 legislate that type of behavior -- to condone -- I mean to sort
6 of ratify that type of behavior? Because now -- I mean, if the
7 law goes into effect and two people go into a restaurant who
8 says, *We are a same-sex couple. We have on shirts We Love Each*
9 *Other,* the restaurant owner can close the door in their face
10 and says, *We are not going to serve you because you are in a --*
11 *because you told us you're married.*

12 Now, yes, it's hypothetically. But the law says that
13 that would then become legal conduct under state law. Am I
14 right or am I wrong?

15 MR. BARNES: Well, I think --

16 THE COURT: The conduct of the business owner.

17 MR. BARNES: I think that that's the state of the law
18 whether 1523 goes into effect or does not go into effect. I
19 think that's already the state of the law, which is why as
20 again address the local ordinances because it is true, there is
21 no state antidiscrimination law. And 1523 doesn't affect --
22 and most importantly, 1523 would not affect any federal cause
23 of action or any federal right that was violated that could
24 be --

25 THE COURT: I want to be protected by my state

1 government and not necessarily the feds every time. So I
2 understand you said there's no state law that -- so what -- I
3 think there's any evidence that the City of Jackson and
4 University of Southern Mississippi has enacted their own little
5 thing to sort of protect that. But they have no duty to
6 enforce it if it's not pursuant to state law. Right?

7 MR. BARNES: Well, Your Honor, again this goes more
8 into *Romer*, but I would just say to a limited extent. What
9 1523 says is to the extent that a local ordinance doesn't
10 provide the same level of protection that this does, then that
11 law would not be enforceable. And it's a matter -- I believe
12 it's *Ryals* -- R-Y-A-L-S -- is one of the Mississippi Supreme
13 Court cases that says, you know, as a matter of state law, any
14 local ordinance which conflicts with a statute is invalid to
15 the extent that it explicitly contradicts that law.

16 So the decision concerning antidiscrimination laws,
17 the state legislature does have the authority to make decisions
18 that are statewide. The City of Jackson does not have the
19 power to force the state to adopt the policy. That's just a
20 matter of the way state government is built. So I will let --
21 again that will be discussed more in the context of *Romer*.

22 THE COURT: Could I ask you this question about the
23 religious -- it's freedom from whatever the name -- Protecting
24 Freedom of Conscience from Government Discrimination? I think
25 Mr. McDuff may have raised the question or at least alluded to

1 it, but did religious people in Mississippi or the people who
2 passed this statute believe that marriages of opposite sex
3 couples were somehow threatened by the newly created right of
4 those to marry the same-sex couple and therefore this freedom
5 from discrimination was important for that reason?

6 MR. BARNES: Yes, Your Honor. I think that's
7 absolutely true that, yes, there are people in this state who
8 hold these religious beliefs that were disfavored in *Obergefell*
9 and rejected essentially as irrational. Yes, I do think there
10 was concern. I do think there were -- the feeling that now
11 clerks -- obviously there was concern among clerks that they
12 might be put in a position of having to act contrary to their
13 religious beliefs.

14 THE COURT: Did opposite-sex couples believe that
15 their marriage was somehow diminished -- I mean, because what
16 we have here is, of course, again going back to *Obergefell*, the
17 broad range of dignity -- uplifting the dignity which was a
18 further development from *Windsor* because *Windsor* I think
19 Justice Kennedy talked a lot about dignity, but then he says,
20 *You're entitled to the full plate of dignity now, and we're*
21 *going to -- there should be nothing which reduces that dignity*
22 *to that marriage. In other words, all marriages will be*
23 *treated equally.* So how does this statute treat those
24 marriages equal?

25 MR. BARNES: Well, Your Honor, I guess again

1 plaintiffs may perceive it as a technicality. I know the court
2 doesn't. But Supreme Court cases -- civil rights cases aren't
3 decided just on broad principles. They have also got to be
4 decided on discrete and concrete facts and evidence.

5 And the simple truth is the way plaintiffs have
6 attacked this law is attacked every possible conceivable way
7 that some person might interpret this law, and that is not the
8 way that you're supposed to interpret the constitutionality of
9 a law and standing.

10 THE COURT: Let's --

11 MR. BARNES: Does a -- I apologize, Your Honor.

12 THE COURT: No, no. Let's ask this question then.

13 They only itemize three moral codes or whatever -- the three
14 things. Because they are limited to those three things,
15 doesn't that on its face suggest that there are things that
16 they don't recognize? It specifically says three things, under
17 Section 2, I believe.

18 MR. BARNES: It does, Your Honor. And, again, we're
19 not asking the court not -- to take this out of context or
20 consider it in isolation. We agree the court should consider
21 it in the context of *Obergefell* and what it came down. And
22 nothing in 1523 says, *We don't like same-sex couples. We're*
23 *going to do whatever we can to put this in the way of same-sex*
24 *couples. We're going to throw up whatever roadblocks we can to*
25 *same-sex couples.*

1 It says, *You can't prevent somebody -- you can't delay*
2 *them from getting a marriage license.* It also says -- one of
3 the other things specifically in that health care section we
4 talked about some, it specifically says, *You can't deny someone*
5 *access to their loved one in hospitals.* And so 1523 says this
6 is about protecting people who hold beliefs that after
7 *Obergefell* can easily be viewed as out of date, not modern.
8 And *Windsor* in the dissent, it was tarred with the brush of
9 bigotry.

10 So, yes, we think in the context of *Windsor* and then
11 *Obergefell* is a perfectly reasonable belief that persons
12 holding those particular beliefs could be put in a position of
13 being discriminated against or being forced to act contrary to
14 their beliefs. And the issue here is whether or not they can
15 live by those beliefs. Plaintiffs -- nothing in 1523 prevents
16 plaintiffs by living -- holding their beliefs and living by
17 those beliefs. And just -- like I said, the Fifth Circuit in
18 this case, you know, specifically pointed out, you know, that
19 intersection and said this is going, you know -- words to the
20 effect that this is going to be a problem.

21 So I think, Your Honor -- I've got to let -- Mr.
22 Miracle I know has things -- has answers to some of the court's
23 questions, and I just wanted to conclude by saying that, again,
24 look at the -- if we look at the evidence, if we look at the
25 evidence that the plaintiffs have presented, and you try to

1 find the connection between particular defendants and a
2 particular situation that doesn't require more than three "ifs"
3 to get to, we think that there is not sufficient evidence to
4 show that plaintiffs are in danger of suffering an imminent and
5 irreparable harm.

6 THE COURT: Thank you, Mr. Barnes.

7 MR. MIRACLE: If it please the court, Your Honor.

8 THE COURT: You may proceed.

9 ARGUMENT FOR DEFENDANTS HOOD AND MOULDER

10 MR. MIRACLE: I'm going to confine my remarks to a few
11 points on standing, and they really relate to some questions
12 Your Honor raised with Mr. McDuff about do we have the right
13 parties. And it's also in our briefing so I'm certainly not
14 going to belabor the issue. But I do think that it merits
15 attention in the context of -- we've talked a lot about CS I.
16 There was a CS II, as the court is aware of. And some of the
17 same issues that were present in CS II we have here.

18 What I mean by that is in CS II involving the adoption
19 statute, plaintiffs there, Campaign being one of them and
20 Dr. Hrostowski being another one of them, sued the governor,
21 sued the attorney general, sued the executive director, who at
22 that time was a different executive director and sued some
23 judges, state court judges, who the district court summarily
24 dismissed as to the judges.

25 But *Okpalobi* was a big part of the analysis in terms

1 of the attorney general and the governor. And counsel opposite
2 made some references to, *Well, this is an establishment clause*
3 *case and we are to look at this entirely differently*, but the
4 Supreme Court in *Winn*, you know, said you still have to look at
5 all three element of standing, the *Lujan* elements that were we
6 are all familiar with.

7 And so the remarks I'd make today, and the argument
8 I'd make today concerns the causation prong as it relates to
9 the evidence the court has heard. These particular plaintiffs
10 in the CSE III case, as it relates to the particular defendants
11 that they've sued -- and we have more plaintiffs, of course, in
12 the Barber case, but we have the same defendant. So there are
13 similarities.

14 But I'd start with the proposition that under
15 *Okpalobi*, the outcome in this case as to the governor and as to
16 the attorney general is no different than the outcome was in
17 CSE II in that the court found that there was absolutely no
18 enforcement mechanism with respect to the attorney general or
19 to the governor.

20 The allegations in the complaint in CSE III against
21 the governor is that he is the chief executive officer of the
22 state and that he has some responsibility to carry out to make
23 sure that policies and procedures are carried out. That was
24 the same argument that was made in CSE II. And under the
25 *Okpalobi* analysis and whether or not there's any connection

1 between that and the enforcement of the statute, the court said
2 there was not.

3 THE COURT: Is there a proper defendant, then, for any
4 plaintiff to sue to enjoin this particular statute or any
5 statute that is not in effect, obviously? So who would be -- I
6 don't need -- maybe I shouldn't get you to tell them who the
7 proper party to sue might be, but how does one challenge --
8 bring a facial challenge or any challenge, number one, to a
9 statute that is not in effect? But, you know, the governor has
10 no enforcement mechanism, as you might say, over only a few
11 statutes.

12 MR. MIRACLE: Number one, I won't offer up Justice
13 Chandler as a potential. And certainly I anticipated the
14 court's question on that, and certainly it's not -- I'm not
15 trying to avoid the court's question, you know, but the
16 plaintiffs chose the plaintiffs that they were going to include
17 in this, and they chose the defendants. And it is their burden
18 to challenge standing.

19 And let me draw a distinction, if I could -- and I am
20 going to answer the court's question, but I wanted to set it up
21 just a little bit. The only defendant that the court in CSE II
22 found to have some type of causal connection and not be
23 precluded under *Okpalobi* was the executive director of the
24 Department of Human Services. And the reason for that was the
25 statute at issue there was the statute that impacted a same-sex

1 couple's ability to foster or to adopt, and the court found
2 there was a sufficient connection there.

3 But we have to look at this case, these plaintiffs and
4 what this statute -- what provision of this statute -- those
5 defendants, as the court's already pointed out, the term
6 "standing is not dispensed in gross," well, this is sort of an
7 example of this. This statute covers several different areas.

8 For example, Judy Moulder can only be implicated in
9 Section 3(8)(a). She's the state -- current state registrar.
10 She's been sued in her official capacity. The court hasn't --
11 didn't hear any testimony -- there's no evidence in this record
12 that any of these plaintiffs are in any way impacted by our --
13 causally related to Judy Moulder. Those are the claims that
14 the plaintiffs chose to bring, and that's the defendant that
15 they chose to bring. But there's no proof in this record that
16 Judy Moulder has any causal connection to these particular
17 plaintiffs so I think that's a big distinction.

18 With respect to the executive director Davis, there's
19 been no testimony, there's been no proof in the record, that
20 there's any causal connection between having executive director
21 Davis as the head of DHS simply because there's a provision in
22 this statute that has something to do with adoption or with
23 foster care.

24 So they put these defendants in there and said, *Well*
25 *there's one provision that relates to Judy Moulder because*

1 she's the registrar, and there's a provision in here that
2 relates to DHS so we put that defendant in here, but yet none
3 of these plaintiffs have -- there's no proof in the record that
4 any of these plaintiffs have any connection or are going to be
5 impacted by those defendants. So this is to me sort of a
6 classic example of we have a lot of potential defendants but
7 these plaintiffs have to have a cause of action against these
8 defendants.

9 THE COURT: Should they have named every circuit clerk
10 in the state of Mississippi because only circuit clerks can
11 issue licenses and we don't know what one might do and who
12 might recuse and -- what they are trying to do, I think, is to
13 make sure that this statute does not come into play.

14 Now, even if all 82 circuit clerks decided that they
15 would recuse, there's nothing that requires them to do that
16 before July 1. Right? We agree with that, don't we? Nothing
17 requires them to file any notice of recusal before the act goes
18 into effect.

19 MR. MIRACLE: That would be correct.

20 THE COURT: So if you wanted to stop the act from
21 going into effect, and if you sued every circuit clerk, I
22 assume based on what you're saying now, the state would say,
23 *That's too early.*

24 MR. MIRACLE: Well, in fact, Your Honor, it does point
25 to the issue -- and we've briefed this and I don't want to get

1 off into that. But it does present the question whether or not
2 this is a proper facial challenge or not because -- the
3 establishment clause that's been thrown in as an umbrella to
4 sort of cover everything, and certainly standing and the
5 establishment clause does create a different set of
6 circumstances, but it doesn't eviscerate the requirement to
7 *Lujan* that you have to have injury and in fact, causation, and
8 redressability.

9 So I think the answer to the court's question there
10 goes directly to our point of why let's just take as to the
11 clerk provision because it hasn't happened and because it
12 requires us to hypothesize about is it going to be one, is it
13 going to be ten, or how is a particular circuit clerk's office
14 going to handle a recusal, those are all hypothetical.

15 And so that's why we think this is a programmatic
16 facial challenge when you start looking at what the specific
17 injuries are purported to be. None of these plaintiffs have
18 testified that they are going to get a marriage license on
19 July 1st. There's no testimony to that effect. So we have to
20 hypothesize that that might happen. Well, we think that causes
21 a significant problem with respect to a facial challenge as it
22 relates to Section 3(8)(a).

23 Same thing with had there been a plaintiff here who
24 testified that they anticipated adoption services in the
25 CSE III case, there's certainly nobody there that is in any

1 imminent danger of being denied anything that section 3(2) --
2 I'm sorry Section 3(3) purports to protect.

3 So I guess what I'm saying, Your Honor, is we are not
4 saying that there are no proper defendants, if ever. And,
5 quite frankly, it's the plaintiffs' burden to come forward to
6 establish standing in the first instance, but we do think that
7 it does show why a facial challenge when you look specifically
8 at what they are asking this court to enjoin becomes
9 significantly problematic because none of those things have
10 happened.

11 And it is -- when we start looking at discrete
12 provisions and discrete defendants and what their nexus is
13 under the causation prong for Article III standing, we do think
14 there is significant problems. So I would say with respect to
15 the governor and with respect to the attorney general, we think
16 the conclusion of the court in *CSE II* and the application of
17 *Okpalobi*, those two defendants are not proper defendants.

18 But if the plaintiffs are going to challenge
19 Section 3(8)(a) with respect to Judy Moulder over something
20 that has not yet happened, we think that does not satisfy the
21 immediate harm prong that they are required to establish for
22 purposes of a preliminary injunction.

23 THE COURT: If it's true as plaintiffs say that this
24 particular law establishes a religion, who would -- who could
25 the plaintiff sue? The governor through his advisors may have

1 been told that, *This establishes a religion, Mr. Governor; do*
2 *not sign it*, and the governor proceeds to sign it. Should they
3 sue the legislature for even passing it if they -- if it were
4 as simple as Ms. Kaplan said that the Southern Baptist Church
5 is the preferred or the adopted church of State of Mississippi,
6 I believe we may all be able to agree that that would be
7 unconstitutional.

8 So who would be the proper defendant because the
9 governor is going to sit back and sign it and nothing happens.
10 The legislature passes it and nothing happens. And the
11 attorney general comes up to defend it, but the attorney
12 general just says, *I'm doing my job*. So who would be
13 responsible for -- who could be a proper defendant -- who could
14 bring --

15 MR. MIRACLE: In that hypothetical, Your Honor, if I
16 may -- and I'm -- with respect to the governor because we do
17 see a plethora of lawsuits that the governor gets sued because
18 he's the chief executive officer or the attorney general
19 because he's the chief law enforcer, we do see those on a
20 fairly regular basis.

21 *Okpalobi*, I don't believe, is so -- *Okpalobi* had two
22 iterations. It had an Eleventh Amendment iteration to it and
23 then it had a standing iteration to it, and I believe it was
24 Judge Jolly wrote the panel opinion and it went through a lot
25 of different analysis. But I think the Fifth Circuit was very

1 careful in that case, and I think the court in CSE II was very
2 careful to analyze -- there's not any -- there are never no set
3 of circumstances, I don't think, where there might -- there
4 wouldn't a proper party.

5 And Your Honor's hypothetical suggested issues that
6 may create the nexus, if you will, because that's really what
7 *Okpalobi* looked at. And going back to *Ex Parte Young*, under
8 the Eleventh Amendment iteration, *Ex Parte Young* did the -- I
9 believe it was the attorney general in that case had specific
10 authority, specific power to do something there, to enforce.

11 You know, it has to be looked at with respect to the
12 specific statute and with respect to the facts. But simply to
13 say the governor is the chief executive in this case when
14 there's no nexus -- I simply don't know how to get around what
15 *Lujan* says and what *Winn* says. Even in establishment clause
16 context, plaintiffs still have to prove all three elements of
17 standing. You don't just get to say, you know, we have proven
18 an injury for a facial challenge, and that's sufficient.

19 THE COURT: Do you -- if this is an establishment
20 clause case and you are fighting about what the legislature has
21 enacted and that the governor has signed, who do you sue? The
22 legislature or the governor?

23 MR. MIRACLE: Your Honor, I'm going to confine my
24 answer, I believe, to based on what they have alleged, based on
25 the principles in *Winn* and *Okpalobi*, we don't believe there's a

1 nexus in this particular case to the governor or to the
2 attorney general by no means. I think Mr. McDuff made an
3 argument that they would be -- if the court enjoined the
4 statute, somehow the attorney general and the governor would be
5 prohibited from taking any action or relieved of their duties
6 under the statute.

7 But I think each defendant has -- each defendant in
8 this particular case is differently situated depending on which
9 provisions of the statute we're talking about. And so I
10 simply -- and we've made these arguments, and I don't want to
11 take up too much more of the court's time. But I do want for
12 clarify of the record when the plaintiffs claims are being
13 evaluated vis-a-vis each particular defendant with respect to
14 *Okpalobi* and with respect to causation, that there's not a
15 blanket thrown over all of those defendants and say, *Well, in*
16 *some form of fashion one of them must be the right defendant.*
17 And without completely avoiding the court's question, we simply
18 take this case as it is with these plaintiffs and with these
19 defendants and with these claims, and we think they have failed
20 with respect to the causation prong.

21 We think they failed for all three reasons, but
22 particularly I just wanted to address the causation prong and
23 further flesh that out with the court from what we said in our
24 brief.

25 THE COURT: Okay. Is it -- should there be -- should

1 the court look at standing from jurisprudential sort of view
2 differently -- well, is standing any different in an
3 establishment clause case, is it any different in a taxpayer
4 case like *Winn*? I mean, because it bothers me that if
5 plaintiff cannot show any direct harm, for example -- and again
6 this is my -- well, this is -- I'm adopting Ms. Kaplan's
7 hypothetical.

8 Southern Baptist Church becomes the official religious
9 of the state of Mississippi. No enforcement mechanism will be
10 behind it. They are not going to shut down all Methodist or
11 other churches. They just say it. They just adopt it. They
12 enact it. The attorney general is given no power, authority to
13 shut anybody else's church down. The governor is not given any
14 power to shut anybody else's thing down. Somebody ought to be
15 able to bring a suit against the state of Mississippi for doing
16 that.

17 MR. MIRACLE: As I appreciate the distinction -- and I
18 was looking for the case in my brief, and it's in my brief but
19 I was listening to the court's question. As I appreciate the
20 distinction of standing in an analysis of, let's say, a facial
21 challenge because that's really what we're dealing with here,
22 that there are a number of Supreme Court cases that have said,
23 you know, even in a facial challenge we know that the -- the
24 court should not engage in hypotheticals.

25 But in the establishment clause context -- and I

1 apologize. I just don't have the cite in front of me. The
2 court has said in the context of establishment clause, *We don't*
3 *have to completely ignore what could happen* and then loops the
4 analysis back into the *Lemon* test. And so that's how I
5 understand and appreciate how standing in a facial challenge
6 differs in the establishment clause context as opposed to a
7 nonestablishment clause facial challenge that you would look to
8 *Lemon*.

9 So I guess that's a long-winded way of saying
10 depending on the statute and depending upon who's been sued,
11 the court would still have to ultimately look at the *Lemon*
12 factors for purposes of standing.

13 THE COURT: Okay. Thank you, Mr. Miracle.

14 MS. KAPLAN: Your Honor, I had said to opposing
15 counsel that I would get them out before lunch. So if we could
16 do -- still if we could do a break for the court reporter and
17 then finish, that would certainly be our preference. I know
18 other people need to eat.

19 THE COURT: Mr. Goodwin is coming next? Is that
20 right?

21 MR. GOODWIN: Yes, Your Honor.

22 THE COURT: Okay. We'll take a 15-minute break and
23 then we'll -- I'll make sure we move it on.

24 (Recess)

25 THE COURT: Mr. Goodwin, your turn.

1 MR. GOODWIN: Thank you, Your Honor.

2 THE COURT: All right.

3 ARGUMENT FOR DEFENDANTS BRYANT AND DAVIS

4 MR. GOODWIN: Your Honor, I would like to briefly
5 address some of the issues that came up during Mr. McDuff's
6 argument earlier with regards to the equal protection clause,
7 *Romer* in particular. Given gastronomical concerns among
8 everyone in the room and Mr. McDuff's schedule this afternoon,
9 I'll keep it brief.

10 And I'm reading from my notes here so forgive me. But
11 Mr. McDuff cites in his reply brief and mentioned earlier the
12 case of *Heckler*, and he cited it with regards to standing. And
13 again this is standing for the purposes of the Fourteenth
14 Amendment. I can't begin to delve into the establishment
15 clause, and I'm glad I've not been tasked to do so, but the
16 principle of law with regards to equal protection that he cites
17 is true and correct. It is the law. However, law is made not
18 in a vacuum; it's made based on facts that are particular to
19 each case.

20 And in the *Heckler* case, that involved the denial of
21 social security benefits to a man who claimed -- well, he
22 applied for benefits and then was denied, and then his case was
23 *Well, if I had been a woman I would have gotten those benefits.*
24 And so in that case you had an actual denial.

25 Now, for the purposes of standing and injury, it --

1 the law says it has to be concrete and actual or imminent. So
2 there's that. And in this case, the plaintiffs have shown
3 neither an actual or imminent injury. We've yet to hear any
4 testimony in this case that someone was preparing or about to
5 seek a marriage license and someone was preparing or about to
6 seek some accommodation related to a marriage.

7 We've just heard no testimony about that. It's been
8 limited to that, *This law draws a line. I'm on one side of it;*
9 *others are on the other side. Therefore, I'm disfavored, and I*
10 *have terrible feelings about that.* And as we cite in our
11 briefs, Your Honor, that's simply not enough for the injury
12 component of standing so I wanted to make that point.

13 As to *Romer* itself, the law in that case is factually
14 distinguishable from the law that we have here, House Bill
15 1523. And I'd like to read the law with the court's
16 indulgence. And I'm reading from the case itself. "No
17 protected status based on homosexual, lesbian, or bisexual
18 orientation, neither the state of Colorado through any of its
19 branches or departments nor any of its agencies, political
20 subdivisions, municipalities, or school district shall enact,
21 adopt, or enforce any statute regulation, ordinance, or policy
22 whereby homosexual, lesbian, or bisexual orientation, conduct
23 practices, or relationships shall constitute or otherwise be
24 the basis of or entitle any person or class of persons to have
25 or claim any minority status, quota preferences, protected

1 status, or claim of discrimination. This section of the
2 constitution shall be in all respects self-executing."

3 That is -- and, of course, the Supreme Court struck
4 down that law, and that is the far end of the extreme when it
5 comes to a state taking action, drawing a line, and
6 discriminating against one group over another. It expressly
7 repealed every law on the books as of the day that it went into
8 effect. Not only that, but it expressly prohibited the
9 enactment of any future laws that might grant any
10 antidiscrimination protection whatsoever for the lesbian and
11 gay community in Colorado, and that's factually distinguishable
12 from House Bill 1523.

13 Your Honor, there's between a ton of discussion
14 already about what the law means, what it says, but ultimately
15 it is a law that provides additional protections for the people
16 that believe those three enumerated beliefs --

17 THE COURT: Including the fact that you don't
18 recognize the equal dignity of same-sex marriages.

19 MR. GOODWIN: Yes.

20 THE COURT: It sort of uplifts your right to say -- to
21 push back with recognition of those. It's like *Romer* in that
22 sense. You have same-sex -- persons of same-sex marriage who
23 don't have to be treated like people of opposite-sex marriages
24 or within opposite sex.

25 MR. GOODWIN: Going back to standing, Your Honor,

1 that's -- again, the plaintiffs state exactly what Your Honor
2 said, that this law, 1523 offends their dignity. And I don't
3 disagree with -- or I don't not believe anything they've said
4 with regards to their feelings. And as a Mississippian, I hate
5 to hear anyone express the sadness and the things that we've
6 heard on the stand over the last couple of days.

7 But, again, we've not heard any one of them say that
8 their injury was imminent, that they were going -- that they
9 were going to seek a marriage license, that they were going to
10 seek a cake for a marriage, anything related to a marriage,
11 counseling services, and they were in fear that they would be
12 denied those services.

13 And so for that reason, Your Honor -- and we've stated
14 all of that in our brief. But for that reason, Your Honor,
15 there's no standing in this case, especially as to the injury
16 component for the Fourteenth Amendment, and we believe that
17 *Romer* is distinguishable on those bases from 1523, Your Honor.

18 THE COURT: With respect to *Romer*, turning sort of to
19 the question that I had asked Mr. Miracle, *Romer* was the
20 governor of Colorado, and I think we've talked about *Wallace v.*
21 *Jaffree* or whatever it is, the governor of Alabama. I'm trying
22 to figure out maybe for equal protection purposes would the
23 governor be a proper defendant in this matter because the
24 governor in Colorado was good for that equal protection
25 challenge.

1 MR. GOODWIN: Your Honor, I can't speak to the
2 specific -- the ruling and the finding based on the facts in
3 *Romer* as to why the governor was a proper party in that case
4 versus what we may have here. We don't believe the governor is
5 a proper party here in this case.

6 As Mr. Miracle stated earlier, I too was involved in
7 the CSE II case, which was with regards to the adoption ban,
8 and the governor was not -- was found in that case to not be a
9 proper party, that there was standing lacking to sue him. And
10 so -- but I can't say enough about the Colorado situation to
11 say that you can transpose that to Mississippi, Your Honor.
12 You just don't know.

13 THE COURT: And if the plaintiffs' claim is one that
14 the equal dignity of our relationships are affected by this
15 statute because *We are the targets of this statute. If this*
16 *statute goes into effect, not only would we be the target, we'd*
17 *be the bullseye.* Should they have to wait until they are
18 physically harmed in some way before they seek to get some sort
19 of redressability?

20 MR. GOODWIN: I think, Your Honor, that's where the
21 imminent part of that injury test comes in, and there can be
22 actual or imminent. And it's got to be more than hypothetical,
23 more than conjecture. And based on the cases we have cited in
24 our briefs, it's got to be more than simply a feeling of being
25 disfavored under whatever the law is that's being enacted. And

1 so --

2 THE COURT: But the feeling of being disfavored is
3 that your rights as a same-sex couple are not equal to the
4 rights of people who are in opposite-sex marriages.

5 MR. GOODWIN: If a simple feeling was enough or
6 subjective belief feeling that you were disfavored, then you
7 would have Article 3 standing to challenge any statute on the
8 books. The law is clear that there has to be more than that,
9 at least based on our research, more than that to establish the
10 injury component for standing.

11 THE COURT: What about when you show that you are
12 the -- you are the target, if you will, of the animus of the
13 law becoming -- now, you may not be hurt in any way, but the
14 statute might have been enacted -- and I'm not suggesting that
15 that's what the court is finding -- to hurt you, to reduce your
16 dignity, animus, to -- to hurt you. Do you have to wait until
17 the statute comes into effect and that you do then a month
18 later decide to go into some restaurant and -- or decide to go
19 seek counseling or whatever, do you have to wait until that
20 point?

21 MR. GOODWIN: Preenactment facial challenges are
22 obviously allowed, Your Honor, in cases where statutes have yet
23 to be enacted. And again, I don't believe you have to wait
24 until -- you've got to show that you're making -- taking steps
25 to obtain a benefit or to seek something and that you -- at the

1 denial the injury is imminent, which to me doesn't mean that it
2 has to have actually happened and that it's happened in the
3 past and now I'm bringing it, because obviously when you're
4 challenging something that's not been enacted yet, it's not --
5 doesn't have the force of law, you haven't been damaged by it
6 in that way.

7 But you've got to show more -- based on the cases that
8 we have cited and that we've read, more than simply saying this
9 treats us differently and it's going into effect on X date when
10 it goes into effect, we're injured.

11 THE COURT: Let me ask -- I think this last question
12 of you -- is there with respect to the state officials who are
13 implicated by this statute -- and I'm using "implicated"
14 broadly -- is it confined to people in DHS who have a duty over
15 either the child adoption foster care services, is it confined
16 to those who simply issue licenses to be married, or does it go
17 beyond those who may treat persons of -- who are within
18 same-sex relationships differently?

19 You don't have to go apply for a license, for example,
20 to lose a benefit from the state. Does this law allow other
21 state officials the -- well, the law as it reads now talks
22 specifically about clerks, talks specifically about those who
23 did counseling services, whether treatment, whether it is
24 limited to same-sex treatment. Does it only apply in those
25 contexts?

1 Are there other contexts -- I'm thinking one question
2 I asked on Monday was whether the person who might be over I
3 think it was Department of Agriculture, Cindy Hyde-Smith, I
4 believe, if she decides after July 1 to exercise her strongly
5 religious -- this is a hypothetical. I don't know what her
6 religious views are. But if in doing so she does not allow the
7 coliseum or the -- or the ag museum or something like that to
8 be used to host a gathering of persons in same-sex
9 relationships, does this statute have any implication on that
10 type of conduct?

11 MR. GOODWIN: Your Honor, I would probably -- would
12 love to consult with cocounsel to make sure. But my reading of
13 it, if we're talking about -- if Your Honor is talking about a
14 convention or a conference, if you will, of same-sex couples or
15 LGBT conference, that sort of thing, that the provisions with
16 regards to accommodations for meetings, that sort of thing,
17 providing -- are provided in the marriage context and I believe
18 religious organization context --

19 THE COURT: So marriage only. So suppose somebody
20 wants to have their wedding reception at the ago museum on
21 Lakeland Drive. She says, *My sincerely held religious views*
22 *don't allow me to issue it*, does this require her then to do
23 the recusal thing?

24 MR. GOODWIN: Your Honor, I'm not certain. One
25 moment. May I?

1 THE COURT: Okay.

2 (Short Pause)

3 MR. GOODWIN: Your Honor, I've conferred with learned
4 cocounsel on that issue, and we can think of nothing in the law
5 that would apply to Cindy Hyde-Smith in that factual scenario.

6 THE COURT: Let me ask you another question, then.
7 I'm sorry. State health departments are in every county.
8 Doctors in those facilities depending on how you -- if I agree
9 were the interpretation of Mr. Barnes with respect to treatment
10 and all of that and they are not treating a person for either
11 counseling in regard to preparation for transgender stuff or
12 any of that -- just you're coming in to the health department
13 to be treated, no one in the local health department could
14 refuse treatment based on their sincerely held religious belief
15 views.

16 MR. GOODWIN: Your Honor, I'm not aware of anything in
17 my reading of it that would allow someone to do that.

18 THE COURT: Okay. All right.

19 MR. GOODWIN: Your Honor, with that, we would simply
20 ask that the motion for preliminary injunction be denied, and
21 we stand on our briefs as to any other arguments that we may
22 not have addressed today. And we want to thank the court for
23 the opportunity to be heard on this issue.

24 THE COURT: Thank you, Mr. Goodwin. Any rebuttal?

25 REBUTTAL ARGUMENT

1 MS. KAPLAN: Your Honor, if I may, I'm going to start
2 with the standing arguments made by Mr. Miracle. CSE II was an
3 equal protection case, not an establishment clause case. And
4 the problems in that case was -- one of the problems was the
5 fact that adoptions in this state are for the most part
6 approved by chancellors, and there's a lot of law that I'm sure
7 Your Honor is familiar with about not being able to sue state
8 court judges in federal court. That was really the issue that
9 we will to deal with in CSE II.

10 This, Your Honor -- or at least our version of this,
11 CSE III, is an establishment clause case. And the
12 establishment that we challenge all revolves around one section
13 of the statute, Section 2, which is the section that provides
14 for three specific religious beliefs. Every single other
15 section of the statute turns on Section 2. Every act that
16 someone can take or refusal to act that someone can do pursuant
17 to HB 1523 is because of Section 2. That's why it's an
18 unconstitutional establishment, and that's why -- and it's an
19 establishment clause case.

20 Now, in connection -- let me back up for a second. I
21 have -- I've read a lot of establishment clause cases to get
22 ready for this argument, more than I probably had ever wanted
23 to. I have never seen an-as applied establishment clause case,
24 contrary to what Mr. Miracle suggested. And, in fact, in *Bowen*
25 *v. Kendrick*, the Supreme Court said exactly the same thing,

1 47 US 589. They said, "Few of our cases in the establishment
2 clause area have explicitly distinguished between facial
3 challenges to a statute and attacks on the statute as applied."
4 This concept of an as-applied challenge in trying to use
5 *Okpalobi* in this context makes no sense in the context of the
6 establishment clause.

7 Moreover, as for the *Okpalobi* case, I'm aware -- and
8 we researched this very carefully -- of only one court who has
9 considered the Fifth Circuit's decision in *Okpalobi* in the
10 context of an establishment clause case. That's the case we
11 cited in our brief, *ACLU v. Blanco*. The cite is
12 523 F.Supp. 2d 476. It's out of Louisiana. And there the
13 court made almost exactly the same -- answered Your Honor's
14 question exactly the same we would. She asked the same
15 question. She answered the same way. She said there the
16 governor and the treasurer could be sued, and the governor
17 could be sued because before the act became law, the governor
18 had the opportunity and authority to veto any line item in the
19 appropriate bill, including the appropriations challenged in
20 this case.

21 On all fours with this case, Your Honor, the only
22 decision out there -- I would question whether *Okpalobi* even
23 applies in the context of the establishment clause; but if it
24 does, the reasoning in *Blanco* is directly applicable here and
25 should apply here.

1 Let me move on to the merits. Now, in answer to a
2 question from Your Honor about how anyone would exercise these
3 three sincerely held religious beliefs that are specified in
4 the statute, Mr. Barnes used the example of the clerks. And
5 there's been a lot of discussion about clerks. And it's
6 certainly there, but the statute, as we describe it in our
7 brief, is actually far, far broader than just a statute that
8 deals with clerks.

9 I'm just going to pick out some random words in the
10 statute. They are not my words; they are words that the
11 legislature chose. So it applies to employment-related
12 decisions. It applies to the terms and conditions of occupying
13 a dwelling or other housing. It applies, as we discussed, to
14 adoption in foster care. It applies to psychological
15 counseling or fertility services, and I'll get back to that in
16 a bit. It applies to photography, poetry, videography,
17 disc-jockey services, wedding planning, printing, publishing.
18 It applied to floral arrangements, dressmaking, cake, pastry
19 artistry, assembly-hall or other wedding-hall venues, limousine
20 or rental cars, jewelry sales, and other similar services,
21 accommodations, facilities or goods.

22 It applies -- these are all directly from the
23 statute -- to employee or student dress or grooming, to
24 restrooms, to spas, to baths, to showers, to dressing rooms, to
25 locker rooms.

1 So to suggest that this statute is somehow some narrow
2 statute that someone only exercises these religious beliefs
3 through someone working in the clerk's office completely
4 distorts the scope and the breadth of this statute.

5 THE COURT: When it says "similar marriage related
6 goods or services," I know it listed a bunch of things as
7 typically tied to weddings. Suppose there's a travel agent
8 that specializes or specifically services people in
9 honeymooning. Would it -- opposite-sex marriage, the same-sex
10 marriage. Would marriage-related goods or services, could it
11 be interpreted to include that?

12 MS. KAPLAN: There's no question in my mind that
13 someone would make that argument, Your Honor. If there was
14 someone who worked in a travel agency in Mississippi who didn't
15 want to book a honeymoon for a gay couple, I guarantee you --
16 and they knew about this, they would make that argument.

17 Moreover, the marriage-related services that you just
18 pointed out only applied to that subsection. They don't apply
19 to employment. They don't apply to housing. They don't apply
20 to a host of other things I read in this statute.

21 Indeed if HB 1523 were analogous to the Church
22 amendment that Mr. Miracle was talking about, it would only
23 apply to clerks. It would only have the clerk provision. It
24 doesn't. It's much, much broader than that. And even for
25 clerks, Your Honor, the problem with HB 1523 is that it

1 encourages Kim Davises. The point of the statute is to
2 encourage people to behave the way that Kim Davis behaved.

3 Let me go to -- there are some certain things you were
4 said about the statute in construing it that just aren't true
5 so let me try to correct those. So first, there was an
6 argument that -- somehow there seemed to be an argument that
7 HB 1523 doesn't apply in schools. Counsel was right that there
8 was a whole line of cases about applying the establishment
9 clause in schools. But there is no school exception in
10 HB 1523.

11 Indeed in the definition of people it applies to, it
12 expressly applies to all state employees at Section 3(7), and
13 it does not exclude teachers in public schools. So I don't
14 understand any argument that somehow HB 1523 does not apply
15 into the schools. By its face, by its explicit terms, it does.

16 Two, there was an argument -- and I know Your Honor is
17 in tune to this -- that says that the counseling and
18 psychological services -- let me make sure I got it right.
19 That psychological counseling or fertility services only
20 relates to sex reassignment or fertility. The problem is
21 that's not what the statute says. It's the words in the
22 statute, and this is Section I think 3 --

23 THE COURT: 3(4)?

24 MS. KAPLAN: -- 3(4) separates the words about
25 surgeries related to sex reassignment or gender identity

1 transitioning with an "or." And then it says, "or declines to
2 participate in the provision of psychological counseling or
3 fertility services based upon a sincerely held religious
4 belief." If the psychological counseling services applied only
5 to gender reassignment, again the legislature knows how to do
6 that. They know how to write a statute that says that. That's
7 not what the statute says.

8 Third, there was an argument --

9 THE COURT: Hold on for a second. I'm looking at this
10 section again. So if the legislature wanted to limit it to
11 surgeries related to sex reassignment or gender identity
12 transitioning --

13 MS. KAPLAN: They would either say --

14 THE COURT: A period there?

15 MS. KAPLAN: "Or decline to participate in the
16 provision of such services" or "decline to participate in the
17 provision of psychological counseling or fertility services
18 related to gender reassignment based on a sincerely held
19 religious belief." And the separation between those two
20 clauses with the word "or" does not connect them together.
21 It's exactly the opposite. There are two different things it's
22 talking about. They are using two different kinds of words and
23 two different kinds of language.

24 And that's why the hypothetical that I raised about a
25 kid being treated for counseling or what I talked about on the

1 stand with Joce Pritchett about someone having counseling and
2 the counselor saying, *I'm sorry. Now that I know you think you*
3 *might be gay, I no longer want to treat you,* they are
4 authorized to do that explicitly by HB 1523.

5 And that gets me to my next point. It's not only
6 about gay people who are already married. It doesn't say that.
7 It says, "A sincerely held religious belief that marriage is
8 limited to a man and a woman." That belief can go way beyond
9 whether a high -- obviously high school kids aren't getting
10 married, hopefully. But if you think that kid may be gay and
11 may ultimately want to avail themselves of the now
12 constitutional right to get married, you can deny services.
13 The sincerely held religious belief is very broad. It's the
14 belief that marriage should be limited to a man or a woman --
15 and a woman. Excuse me.

16 Four, there was an argument that the state courts --
17 the state courts were not foreclosed from litigating any
18 claims, and here this get tricky but I'm going to try to point
19 you to the language. Section 9(2) of the statute defines state
20 government, and it includes in 9(2)(b) -- Section 9(2)(b),
21 courts, includes state courts in that definition.

22 And then when you go to Section -- hold on. I've just
23 got to get it, Your Honor. I believe it's Section 6 of the
24 statute -- no, excuse me. Section 6 of the entire statute. I
25 apologize. It talks about getting injunctive relief and

1 getting certain remedies against a person who's violated the
2 act. And under the way this reads, you could get an injunction
3 against a state court judge who sought to enforce the Jackson
4 ordinance that says that you can't -- you can no longer
5 discriminate against gay people in the city of Jackson. And it
6 goes beyond that. It says if the injunction doesn't hold, then
7 you even get attorney's fees, which actually goes into the
8 taxpayer standing. You get fines and fees against that person.

9 Number 5, there was a suggestion that the statute says
10 that somehow federal law controls when HB 1523 is in conflict
11 with federal law. That's not what it says. What Section 8 of
12 the statute says is that, "This act shall be construed in favor
13 of a broad protection of the free exercise of religious beliefs
14 to the maximum extent permitted by the state and federal
15 constitutions."

16 So, yeah, Your Honor, they are right that when it
17 comes to free exercise jurisprudence, HB 1523 to the extent
18 it's any narrower than federal -- free exercise jurisprudence,
19 then the federal jurisprudence applies. But when it comes to
20 any other provision of state -- of federal law, including equal
21 protection or including Title IX, which explicitly has been
22 held to cover transgender people, there's nothing in here that
23 says federal law applies. Of course, we all know it does under
24 the supremacy clause, but there's nothing in here that says
25 that.

1 Now, another argument that we have heard the other
2 side say is this sectarian argument, and we heard it throughout
3 the cross-examination of our witnesses, this argument which is
4 no doubt true that in every church and certainly in every
5 temple -- I can speak to that -- there are people on both sides
6 of an issue. No question that that is true. In every -- in
7 the Episcopal Church there are people on both sides. In
8 Judaism, there are people on both sides. Even in, as I
9 understand it, amongst Southern Baptists there are people on
10 both sides of this issue.

11 And they seem to suggest that if in a church or temple
12 there are people -- or in a denomination there are people on
13 both sides, then you can't have sectarian discrimination. Your
14 Honor, I would respectfully submit that that suffers from a
15 fundamental logical fallacy because we know that there are
16 always people on both sides of every issue in every church or
17 synagogue. And if their theory that if there are people on
18 both sides of a particular church you can't have sect
19 discrimination were true, then all the language that I've read
20 you from Justice Marshall and from other justices of the
21 Supreme Court that says you can't prefer one church over
22 another should have been written out of those cases. It would
23 make no sense.

24 Finally, Your Honor, in the *Obergefell* case, Justice
25 Kennedy wrote at the end about the interplay, the

1 complicated-but-close interplay between equal protection and
2 due process. And I'm going to read you what he wrote. He
3 said, "It is now clear that the challenge laws burden the
4 liberty of same-sex couples. And it must be further
5 acknowledged that they abridge central precepts of equality.
6 Here the marriage laws enforced by the respondents are in
7 essence unequal. Same-sex couples are denied all the benefits
8 afforded to opposite sex couples --"

9 THE COURT: Slow down.

10 MS. KAPLAN: I apologize. "And are barred from
11 exercising a fundamental right. The imposition of this
12 disability on gays and lesbians serves to disrespect and
13 subordinate them, and the equal protection clause, like the due
14 process clause, prohibits this unjustified infringement of the
15 fundamental right to marry."

16 I would suggest, Your Honor, that the same
17 complicated-but-close interplay is at play here between the
18 First Amendment's establishment clause and the equal protection
19 clause.

20 The Louisiana statute that was discussed in the
21 *Aguillard* case, a Louisiana creationism case, had a very
22 similar title to HB 1523. It was called "The Balanced
23 Treatment for Creation Science and Evolution Science in Public
24 School Instruction." The Supreme Court, however, had no
25 trouble identifying it as a statute that violated the

1 establishment clause. And even though the state of Louisiana
2 said it treated both fairly, it saw it as an unconstitutional
3 establishment of religion.

4 In preparing for this argument today, I was reading
5 the work of Martha Nussbaum, who's a great philosopher and
6 legal professor and has written a book about the First
7 Amendment's free exercise and establishment clauses. And she
8 points this out as well. She says, "One of the most central
9 commitments in our constitutional tradition is a commitment to
10 fairness, to treating citizens as equals. What that means is
11 that no hierarchy should exist under the law or in our nation
12 and that religious membership and nonmembership should not be
13 special sources of advantage over disadvantage under the law.
14 The tradition's reason for favoring accommodation was itself a
15 reason of fairness. The majority makes laws that suit itself,
16 and minority believers often encounter special unequal burdens
17 as a result."

18 Your Honor, I would respectfully submit that it is
19 hard to imagine again a law that more fundamentally violates
20 those central commitments in our constitution to fairness for
21 treating citizens as equals under both the equal protection
22 clause and the First Amendment's establishment clause than this
23 statute. Thank you.

24 THE COURT: Thank you, Ms. Kaplan.

25 REBUTTAL ARGUMENT

1 MR. McDUFF: Three points very briefly, Your Honor.
2 Number one, the question of whether somebody in the Department
3 of Agriculture can deny services regarding a wedding
4 celebration, that would be -- they can do that. It would be
5 authorized to do that by Section 3(5) of House Bill 1523, which
6 says "The state government shall not take discriminatory action
7 against a person who declines to provide the following
8 services, accommodations," et cetera.

9 The head of the Department of Agriculture is a person.
10 And here's an example. Let's suppose there is a deputy who is
11 in charge of renting facilities and that deputy has a sincerely
12 held religious belief and says, *I'm sorry. I'm not going to*
13 *rent this. I may rent it to opposite-sex couples. I'm not*
14 *going to rent it to a same-sex couple for a marriage reception.*
15 Not only would HB 1523 authorize it, but it would prohibit that
16 person's -- the commissioner of agriculture, who would be that
17 person's supervisor, from taking any discriminatory action
18 against the deputy who wouldn't rent it. So clearly that is
19 authorized by the statute.

20 THE COURT: And discriminatory action would be
21 disciplinary action for --

22 MR. McDUFF: Any kind of disciplinary action, yeah.
23 Ms. Kaplan quite correctly stressed that House Bill 1523
24 authorizes people to deny psychological and counseling services
25 and that's whether the person works in a public health clinic

1 or a school. And it applies not just to counselors, but it
2 applies to teachers who are asked to counsel a student.

3 You had asked at one point could a teacher kick a
4 child out of the classroom. I don't think 1523 allows a
5 teacher to refuse to teach math to a student. But I do think
6 at the end of the class if a lesbian student or a transgender
7 student or gay student or student who is trying to find her or
8 her way in terms of sexual orientation and gender identity
9 comes up to the teacher to talk about a problem in that regard,
10 this would authorize the teacher to say *I don't believe -- my*
11 *sincerely held religious belief tells me that you are wrong in*
12 *your quest to discover your gender identity or You're a*
13 *lesbian, and one day you're going to marry another lesbian, and*
14 *that is sinful. Get out of my room.* 1523 allows that. And
15 that is one of the many actual harms that are contemplated by
16 this statute.

17 And the final thing I just want to say is, the
18 defendants argue that somehow this is different, this statute
19 is different from a creche or a cross because those are things
20 that a person has to confront visually. But the First
21 Amendment says Congress shall make no law establishing
22 respecting an establishment of religion. Of course, that has
23 been applied to the states through the Fourteenth Amendment so
24 that the principle is also state legislatures shall make no law
25 establishing respecting an establishment of religion.

1 And this is a law. It is the most fundamental
2 expression of the sovereignty and the power of the state. It
3 is unconstitutional. And for that reason and because it
4 violates the Fourteenth Amendment, the preliminary injunction
5 should be granted here.

6 THE COURT: And is that the reason the governor is
7 named a defendant and the attorney general?

8 MR. McDUFF: The governor is named as a defendant in
9 part because he signed it. He was just as much a part -- had
10 just as much a role in it as the legislature in enacting this
11 bill. But the other reason they are named is because their
12 powers are affected by this statute. And let's suppose that
13 some discriminatory action is taken -- let's suppose that a DHS
14 worker decides that he or she cannot take a kid out of an
15 abusive situation, a transgender or lesbian or gay child who's
16 dealing with a foster parent who is abusing them in the course
17 of their, quote, sincerely held religious beliefs, and a DHS
18 worker thinks, *I can't take this out of that because this bill*
19 *restrict me from interfering with that foster parent's*
20 *religious beliefs*, and the head of DHS says, *Oh, I can't tell*
21 *that worker to take him out because then the statute prohibits*
22 *me from taking any discriminatory action against another state*
23 *worker*, and the attorney general says, *I can't go to court to*
24 *get this kid out of this abusive situation because 1523*
25 *restricts me*, and the governor says, *I can't instruct the*

1 *director of the Department of Human Services to pull this kid*
2 *out of this situation because 1523 restricts me, you need to*
3 *issue this injunction to tell all of these people that they are*
4 *not restricted by this unconstitutional statute and that they*
5 *have the same power in this case involving this child -- this*
6 *child's best interest. And the same power in the other array*
7 *of issues that are touched by 1523 that they will before this*
8 *law was enacted. That's why they're proper defendants.*

9 THE COURT: That would equally apply to the person who
10 refused to give up the wedding venue --

11 MR. McDUFF: Yes, sir.

12 THE COURT: -- who says, *I can't do it* -- Cindy
13 Hyde-Smith's person --

14 MR. McDUFF: Right.

15 THE COURT: -- if you will, says, *I can't discipline.*

16 MR. McDUFF: Precisely. So there are other people we
17 could have named, but the people we did name are proper
18 defendants, and all of the issues with respect to standing are
19 met here.

20 THE COURT: Thank you, Mr. McDuff.

21 MR. McDUFF: Thank you, Your Honor.

22 MR. BARNES: Your Honor, we're not going to belabor
23 the points. Our fundamental disagreements with their
24 interpretation of HB 1523 are clearly briefed, and we'll stand
25 on your briefs.

1 THE COURT: Okay. Counsel, thank you for all the time
2 and the attention that you've paid to all of these issues.
3 I've received -- I think before you leave make sure we have --
4 make sure you all are in agreement on all the exhibits that got
5 in. I'm pretty clear on what I think the exhibits are, but
6 just so you will make sure that you all are on the same page
7 with me.

8 The court is going to take these cases under
9 advisement. I realize for hearing purposes I said they were
10 not consolidated. I sort of engaged in that with Mr. Barnes on
11 the initial end of his response. I initially overruled the
12 objection as -- to the objection to consolidating for hearing
13 purposes. I may speak later on whether or not we granted or
14 overruled any kind of consolidations of the matters henceforth.

15 Again thank you for your time and attention. Court is
16 going to take it under advisement, and I understand what the
17 requested relief is. So we'll take it under advisement. Have
18 a great weekend. Court's adjourned.

19 (Recess)

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CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 28th day of June, 2016.

s/ *Cherie G. Bond*
Cherie G. Bond
Court Reporter